

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)
. .
W.R. GRACE & CO., .
et al., . USX Tower - 54th Floor
. 600 Grant Street
. Pittsburgh, PA 15219
Debtors. .
. April 1, 2009
. 10:29 a.m.
.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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1 COURT CLERK: All rise.

2 THE COURT: Good morning, please be seated. This is
3 the matter of W.R. Grace, Bankruptcy Number 01-1139.

4 The participants I have listed by phone are Scott
5 Baena, Brandon Baer, Janet Baer, Ari Berman, David Bernick,
6 Deanna Boll, Thomas Brandi, Elizabeth Cabraser, Douglas
7 Cameron, Linda Casey, Tiffany Cobb, Dale Cockrell, Daniel Cohn,
8 Andrew Craig, Michael Davis, Elizabeth DeCristofaro, Elizabeth
9 Devine, Martin Dies, Melanie Dritz, Terrance Edwards, Lisa
10 Esayian, Sander Esserman, Marion Fairey, Roger Frankel,
11 Theodore Freedman, Joseph Gibbons, Christopher Greco, Robert
12 Guttmann, Jonathan Guy, Barbara Harding, Robert Horkovich,
13 Christina Kang, Matthew Kramer, Arlene Krieger, Magali Lee,
14 Richard Levy, Marc Lewinstein, Jeffrey Liesemer, Peter
15 Lockwood, Douglas Manal, Francis Monaco, Brian Mukherjee, Marti
16 Murray, David Parsons, Margaret Phillips, John Phillips, Joseph
17 Radecki, James Restivo, Samuel Rubin, Alan Runyan., Jay Sakalo,
18 Darrell Scott, Mark Shelnitz, Michael Shiner, David Siegel,
19 Walter Slocombe, Warren Smith, Jason Solganick, Daniel
20 Speights, Shayne Spencer, Theodore Tacconelli, David Turetsky,
21 Edward Westbrook, Jennifer Whitener, Richard Wyron and Rebecca
22 Zubaty.

23 I'll take entries in court, please. Good morning.

24 MR. FREEDMAN: Good morning, Your Honor, Theodore
25 Freedman for the debtors.

1 MS. BAER: Good morning, Your Honor, Janet Baer for
2 the debtors.

3 MR. O'NEILL: Good morning, Your Honor, James O'Neill
4 for the debtors.

5 MR. WESTBROOK: Good morning, Your Honor, Edward
6 Westbrook for the US ZAI Certified Class.

7 MR. SCOTT: Good morning, Your Honor, Darrell Scott on
8 behalf of the Zonolite Class.

9 MS. CABRASER: Good morning, Your Honor, Elizabeth
10 Cabraser on behalf of the Zonolite Class.

11 MR. PASQUALE: Good morning, Your Honor, Pat Pasquale
12 for the Unsecured Creditors Committee.

13 THE COURT: Wait, I'm sorry. Thank you.

14 MR. KRAMER: Sorry, Your Honor, Matt Kramer, Bilzin
15 Sumberg on behalf of the Property Damage Committee.

16 THE COURT: Thank you.

17 MR. RICH: Allen Rich for the PD FCR.

18 MR. LOCKWOOD: Peter Lockwood for the ACC, Your
19 Honor.

20 MR. WYRON: Good morning, Your Honor, Richard Wyron
21 for the PI FCR.

22 MR. McDANIEL: Good morning, Your Honor, Garvan
23 McDaniel for Arrowood and with me is Carl Pernicone, Allen --

24 THE COURT: I'm sorry, I can't hear you.

25 MR. McDANIEL: I'm sorry. With me is Carl Pernicone

1 --

2 THE COURT: Who are you representing Mr. McDaniel?

3 MR. McDANIEL: Arrowood.

4 THE COURT: Arrowood, thank you.

5 MR. McDANIEL: Carl Pernicone, Tanc Schiavoni and
6 Allen Schwartz.

7 UNIDENTIFIED MALE SPEAKER: Good morning. Thank you.

8 THE COURT: Good morning.

9 MR. KOZYAK: Your Honor, John Kozyak, Kozyak, Tropin
10 and Throckmorton in Miami on behalf of Anderson Memorial
11 Hospital with co-counsel Mr. Speights.

12 THE COURT: Thank you.

13 MR. SANDERS: Good morning, Your Honor, Alex Sanders,
14 PD FCR.

15 MS. MILLER: Good morning, Your Honor, Kathy Miller
16 on behalf of Kaneb. And with me are my co-counsel, Mark Pratt,
17 Steve Peirce and Bob Gilbert.

18 MS. ALCABES: Good morning, Your Honor, Elisa
19 Alcabes, for Travelers.

20 MS. YU: Good morning, Your Honor, Elizabeth Yu on
21 behalf of the United States, observing.

22 MS. DeCRISTOFARO: Good morning, Your Honor,
23 Elizabeth DeCristofaro for Continental Casualty Company.

24 MR. GLOSBAND: Good morning, Your Honor, Dan Glosband
25 also for Continental Casualty Company.

1 MR. BROWN: Good morning, Your Honor, Michael Brown
2 for One Beacon America Insurance Company and Seaton Insurance
3 Company.

4 MR. TACCONELLI: Good morning, Your Honor, Theodore
5 Tacconelli for the Property Damage Committee.

6 MR. DEMMY: Your Honor, John Demmy for Firemans' Fund
7 Insurance Company.

8 THE COURT: Ms. Baer.

9 MS. BAER: Good morning, Your Honor. Your Honor,
10 items on the agenda number one and two are claims related
11 matters that we'll ask be continued again to the April 27th,
12 omnibus hearing.

13 THE COURT: All right.

14 MS. BAER: And we'll present orders at the end of the
15 call with respect to those orders.

16 THE COURT: All right.

17 MS. BAER: Your Honor, matter number three is the
18 quarterly fee application. There are, as I understand, no
19 objections. I have an agreed order to present to Your Honor
20 that outlines all of the fees and expenses being allowed.

21 THE COURT: I thought I had an order stamped this
22 morning. I thought it was entered, it may not have been, but
23 I believe that there was an order attached to the COC that I
24 had entered this morning.

25 MS. BAER: There was an order attached, Your Honor,

1 and if that's the case, we will not confuse the issue with
2 another one.

3 THE COURT: All right.

4 MS. BAER: Your Honor, agenda item number four has
5 been entered.

6 MR. SMITH: Your Honor, I'm sorry, if that concludes
7 the fee matters, Your Honor, this is Warren Smith, the fee
8 auditor and if I could be excused on the telephone.

9 THE COURT: Yes, sir, thank you. Anyone who is only
10 interested in fees or any other item on which orders have
11 already been entered, you're automatically excused. Thank you.
12 Okay, Ms. Baer, I'm sorry.

13 MS. BAER: Your Honor, agenda item number five, that
14 item, Your Honor, was dismissed without prejudice due to a
15 procedural error. It has been refiled and it will be up on
16 April 27th.

17 Agenda item number six, Your Honor, you've already
18 entered an order on that. That's the pension matter.

19 Your Honor, that takes us to the contested portion of
20 the agenda. Agenda item seven and eight relate to two motions
21 filed by Kaneb Pipeline, and agenda item number nine relates to
22 the ZAI Class motion.

23 By agreement of all counsel, we've agreed to switch
24 the order. Judge Sanders and Mr. Westbrook have airplanes that
25 leave in a much shorter time and it's difficult to get where

1 they're getting, so the ZAI Class matter will go first and I'll
2 turn that over to Mr. Westbrook.

3 THE COURT: All right. Mr. Westbrook.

4 MR. WESTBROOK: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. WESTBROOK: Ed Westbrook for the US ZAI Certified
7 Class. Your Honor, I am very happy to have with me this
8 morning a co-counsel, co-class counsel, Darrell Scott and
9 Elizabeth Cabraser.

10 Your Honor, we're here this morning on our motion for
11 final approval of the US ZAI Class settlement. And, Your
12 Honor, what a difference a year makes. Just about a year ago,
13 in April 2008, we stood here in Wilmington and we were in the
14 throes of a most contentious period in the ZAI litigation. We
15 had motions concerning the bar date, we had motions concerning
16 relief from stay, motions concerning appellate matters, motions
17 concerning the Barbanti Class and Your Honor heard those matter
18 and we discussed a number of those matters and the Court urged
19 us on April 22nd, was the day we were here, to get serious
20 about settlement. And, Your Honor, I'm happy to report that
21 both sides did get serious about settlement. We had a
22 mediation with Judge Gross which did not get us there, it was
23 not successful and then, Your Honor, through actually the
24 intervention of members of the PI Committee and the Equity
25 Committee, who brought the parties back together, we got on a

1 track that over many, many series of meetings and negotiations,
2 got us to where we are today, to our motion for final approval.

3 Your Honor, in this circuit a motion for final
4 approval of a class settlement is judged by a number of factors
5 called the Gersh Prudential factors. Some courts group them
6 as nine, some as 13, but they all go basically to the same
7 fundamental issue. Is the settlement fair, reasonable and
8 adequate. Not is it perfect, but is it fair, reasonable and
9 adequate.

10 And, Your Honor, to help the discussion move along
11 this morning, I have a chart in which I have grouped the
12 factors and I'm going to discuss them in that order, if I may
13 hand one to the Court.

14 THE COURT: All right.

15 MR. WESTBROOK: Your Honor, beginning on the upper
16 left hand side of the chart, with the factor of complexity,
17 expense and duration and the ZAI litigation, the courts look at
18 what was the nature of the litigation that's being settled,
19 what lay ahead for the parties if there wasn't settlement. And
20 this Court well knows from being in the thick of it, that the
21 ZAI litigation was, perhaps, one of the most complex, expensive
22 and promised to be long lived matters in this very complex
23 bankruptcy. We, obviously, had many years ahead of us, not
24 only in this court, but obviously from disappointed parties in
25 appellate courts if we didn't reach a resolution. So, the

1 complexity of those matters going ahead countenanced a
2 reasonable settlement if it could be reached. So, that first
3 factor certainly argues in favor of a fair, reasonable and
4 adequate settlement.

5 Second, Your Honor, moving around clockwise we have,
6 what were the risks faced by the class in establishing
7 liability and damages and this Court is more familiar than most
8 trial courts, even approving settlements, because you, Your
9 Honor, were at the helm on the issue of risks, not the ZAI
10 risk, but the litigation risk. We had the Science trial
11 summary judgment proceedings, we had all the other proceedings
12 that we were facing, trying to get released from this court to
13 try our claims in the tort system. The Court indicated pretty
14 clearly to us that was not going to happen. We had the risk of
15 appellate review in some timely basis, we had been denied
16 interlocutory review.

17 We firmly and truly believed in the merit of the ZAI
18 claims that we could ultimately prevail, but we recognized
19 realistically that there were tremendous risks, risks that if
20 we went ahead, and things didn't turn out the way we hoped they
21 would be, the class could get very little, or nothing. So, we
22 had significant risks of liability.

23 Going beyond that, Your Honor, we faced the issues of
24 damages. Out in the tort system, we had used our contamination
25 evidence in traditional asbestos property damage cases, to

1 establish damages. We know that in this forum we were going to
2 have some issues about what that contamination showed, was
3 contamination enough, or were we going to have to have air
4 levels that rose to some degree that would be unreasonable to
5 recover. Would consumer protection statutes be allowed to be
6 applied? Again, we firmly believed in our position, Grace
7 firmly believed in its position, but we knew there were
8 significant risks in establishing damages.

9 In addition, in this context, we knew that we had the
10 ZAI bar date. If the bar date were ruled and upheld to be the
11 cutoff for all claims, we knew that there would be no claims
12 beyond the 16,000 or so that had been filed, greatly limiting
13 the number of people who could participate.

14 So, we had tremendous risks there that we were
15 facing. We very realistically evaluated them in negotiating
16 the settlement. That factor also favors a fair, reasonable and
17 adequate resolution.

18 Next, Your Honor, moving around, the stage of the
19 proceedings and experience of counsel. This factor looks at,
20 was this a quickie settlement, did the parties rush in shortly
21 after litigation began said, Your Honor, this is how we want to
22 resolve it, did we have some counsel who were novices in the
23 area, don't know what they're talking about. I don't think
24 anyone in this courtroom would say that we settled this case
25 early in the proceedings. If we weren't in the bottom of the

1 ninth inning, we at least were on the ninth inning as we got
2 serious on discussions.

3 As to the experience of counsel, Your Honor, Ms.
4 Cabraser is a nationally recognized authority on toxic tort and
5 class action litigation. Mr. Scott probably knows more about
6 consumer protection statutes nationally, than anyone in the
7 country, and more about ZAI than anyone in the country, and for
8 my part, Your Honor, I added whatever asbestos expertise I had
9 and I'll leave it at that. But I think that the stage of
10 proceedings, we were late in the proceedings, we had done
11 tremendous discovery, we're knowledgeable counsel. That factor
12 also favors approval of the settlement.

13 Next, Your Honor, we have the reasonableness of the
14 settlement amount and the claims process. Here, Your Honor, we
15 have a fund, variable fund, we can rise up to \$140 million,
16 depending on claims. The reason we have it funded that way,
17 Your Honor and I think it was a very creative solution, reached
18 by both sides, is that Grace sincerely believes that despite
19 what we say, people are just not going to be that concerned
20 about ZAI and they're not going to come forward to do anything
21 about it. We believe they will. But in order to address
22 Grace's concern that it didn't want to leave a large pot of
23 money stranded, where it will never be used, and our concern
24 that people are likely to come forward, although they're not
25 coming forward tomorrow, we agreed to an innovative approach

1 whereby the settlement fund is funded incrementally, and we
2 have a facility that will remain open for at least 20 years,
3 maybe as much as 25 or more years, as claimants come forward.
4 So, the remedy fits the problem, Your Honor.

5 We have a situation where claimants will be able to
6 receive a 55 percent contribution toward their abatement
7 expenses. Now, Your Honor, is that what we wanted? Is that
8 perfect? Absolutely not. Would we have wanted 100 percent,
9 certainly. Was that feasible? No. We have to recognize the
10 reality of life, that a 55 percent contribution is a fair,
11 reasonable and adequate contribution.

12 We also have in the settlement, Your Honor, a very
13 important component which is a multi year, comprehensive,
14 educational program to keep people from unknowingly
15 encountering ZAI because although Grace does not share our view
16 of the potential harm from ZAI, Grace in the settlement
17 discussions acknowledged that we do have that view and agreed
18 that the fund can be used up to \$2 million in the first three
19 years, and the \$500,000 over periods going along, to educate
20 people. Don't go up there, don't unnecessarily disturb it.
21 Regardless of what they believe in their firmly held view, they
22 agreed as part of the settlement to acknowledge our view.

23 The claims process itself, Your Honor, is not a
24 situation where we've made it so complicated that people aren't
25 ever going to be able to access it. The claims process is

1 intended to be very simple. Homeowners will have to show that
2 they have an ownership interest in the property, that they have
3 ZAI, and that they're taking remediation action, in which case,
4 they'll be able to received Grace's or the trust's
5 contribution.

6 So, Your Honor, we believe that the settlement
7 amount, could Grace have been asked to pay more? Sure. We
8 asked them to pay more. Is it realistic to expect Grace to pay
9 more? In our best judgment, we did not believe so, under all
10 the circumstances. This factor, as well, favors the fair,
11 reasonable and adequate finding as to the settlement

12 Moving around, Your Honor, next factor, the class
13 members reaction. What did class members have to say? Class
14 members had until March 13th to file comments about the
15 settlement. We've received absolutely no adverse reaction from
16 any class member, no one opposing the fairness, reasonableness
17 or adequacy of the settlement. We attached the two comments
18 that were field. One was from a claimant who had a personal
19 injury claim, I sent it to Mr. Inselbuch to take care of and
20 the other letter was from a claimant who asked to be
21 represented by class counsel and we certainly are doing that,
22 willing to do that.

23 The opt out issue is also very instructive, Your
24 Honor. We have over 16,000 class members, we received about a
25 196 initial opt out forms. In talking with some of the opt

1 outs, Mr. Scott's office learned that some of these folks
2 thought the opt out form was a claim form, some of them were
3 actually returning the opt out form with a bag of Zonolite.
4 Some of them were also sending in their abatement information,
5 so we contacted them and we said, do you understand opt out
6 puts you out of the class. To date, Your Honor, 40 of those
7 people, about 20 percent of the opt outs said, we made a
8 mistake, we thought it was the claim form. So, now Your Honor,
9 the number has changed a little bit, but we have about 156
10 people out of 16,000 who have opted out, so less than 1 percent
11 opt outs. And that's an infinitesimal number of opt outs in
12 our experience. So, we think the class members reaction, as
13 well as the very small number of opt outs, also favors a
14 finding that the settlement is fair, reasonable and adequate.

15 Next, Your Honor, the courts look at, well, what's
16 the defendant's ability to withstand a greater judgment? Was
17 it realistic to think that Grace could pay much more if we were
18 to persevere for years. And on that, Your Honor, I'm reminded
19 of what you said a year ago, almost, on April 22nd, you said,
20 on Page 65 of the transcript, "So the reality is that in order
21 to keep the debtor functioning and contributing to the trust --
22 you were talking about a potential resolution like this -- and
23 operating a business and making money, there are always
24 limitations on resources. You know, there has to be
25 limitations on resources and people have to take haircuts, it

1 just has to happen".

2 And, Your Honor, we recognize that this settlement is
3 a haircut from the perfect world, but we don't live in perfect
4 world. We think that the \$140 million, which is potentially
5 there, is fair, reasonable and adequate and that understanding
6 that Grace has many other creditors, Grace already has a
7 situation where it'll have to borrow a lot of money to get out
8 of bankruptcy, we think that well, not perfect, this certainly
9 fits the bill.

10 Moving around, Your Honor, to the attorneys fees
11 provisions. Courts look to see, is this a settlement where the
12 attorneys have negotiated a big fee for themselves, and the
13 class is getting nothing or a coupon. Certainly, I don't think
14 anyone would make that contention here, Your Honor. We have
15 not only the \$140 million fund, we have the educational
16 campaign, we have the 20 year facility, we have the remedy
17 which fits the problem and we think that it's a reasonable
18 resolution. In attorneys fees, we have agreed that we're not
19 going to seek any fee until we're successful. That is, until
20 we get final approval of the settlement, until the settlement
21 is incorporated into a successful plan of reorganization, until
22 we advise people about their rights and we do all the things
23 that we're supposed to do to get to success. And when we do,
24 then we'll come to the Court under the normal Third Circuit
25 standards and seek a fee, but there's been no separate

1 agreement as to a fee. This provision, Your Honor, favors the
2 settlement as well.

3 Finally, Your Honor, bankruptcy considerations. In a
4 bankruptcy settlement, the courts look to say, does this fit in
5 the overall context of the bankruptcy? Are we trying to
6 unfairly disadvantage some creditor? Are we taking money from
7 some creditor? Obviously, not, Your Honor. This was a
8 bankruptcy resolution, not only that is fair to the class, but
9 it's fair to the overall bankruptcy, it's supported and was
10 facilitated by the personal injury interests, by the Equity
11 Committee interest and there has been absolutely no creditor,
12 no class member, no litigant, who has filed any paper saying
13 this settlement is not fair, reasonable or adequate.

14 Which brings me to my final point, Your Honor. We
15 did receive one filing, by the Anderson Memorial Hospital,
16 represented by my good longtime friend, Mr. Speights. Anderson
17 makes a point to say that it is not challenging this settlement
18 as fair, reasonable or adequate, but what it asks the Court to
19 do is just to delay this for five months until September, until
20 Anderson can have, apparently, a challenge to the plan because
21 Anderson is an opt out, it's not a member of the class, it's
22 not affected by this settlement, Anderson wants to have
23 everything delayed so that it can raise a plan objection,
24 apparently, in five months.

25 Your Honor, tomorrow, I believe, is the eighth

1 anniversary of this bankruptcy, we will enter our ninth year,
2 we think that any request for delay on an important matter like
3 this, should be viewed very dimly by the Court and we ask the
4 Court not to delay its decision today, but to grant our motion
5 for final approval because by all accounts, by unanimous view
6 of everyone involved, this settlement is fair, reasonable and
7 adequate. Thank you.

8 THE COURT: Mr. Scott, Ms. Cabraser, are you adding
9 anything or are you relying on Mr. Westbrook's presentation?

10 MR. SCOTT: I'm perfectly happy with Mr. Westbrook's
11 presentation.

12 MS. CABRASER: Also perfectly happy.

13 THE COURT: All right. Anyone else speaking in favor
14 of the settlement today? Okay. Mr. Freedman.

15 MR. FREEDMAN: Your Honor, obviously, the debtor
16 fully supports the settlement and thinks it should be approved.

17 THE COURT: Mr. Speights -- oh, Mr. Lockwood.

18 MR. LOCKWOOD: For what it's worth, Your Honor, the
19 Asbestos PI Committee, one of the plan proponents also supports
20 the settlement.

21 THE COURT: Mr. Speights, are you speaking for
22 Anderson?

23 MR. SPEIGHTS: Mr. Kozyak will be speaking for
24 Anderson.

25 THE COURT: All right. Mr. Kozyak.

1 MR. KOZYAK: Thank you, Your Honor. Your Honor,
2 John Kozyak for Anderson Memorial Hospital, with Mr. Speights.
3 Your Honor, despite the characterization of us, Anderson
4 Memorial, I'd like to just get to the -- neither the
5 supplemental or the reply, addressed our basic limited
6 objection, and that was that the motion and the settlements do
7 not appropriately address the treatment of the opt outs, and
8 Anderson Memorial is here to protect its right as an opt out.

9 And it seeks deferral and postponement, and wrapping
10 this up into the plan process because it's integral to the plan
11 process.

12 Your Honor, the notice of the settlement clearly
13 provided that there would be an opportunity for people to opt
14 out and this Court is very familiar with the difference between
15 a permissive class and a mandatory class. And this Court is
16 also familiar with the disclosure statement objections that we
17 had last month, early last month. When we pushed, no one else
18 pushed, we pushed to make sure that it was described what would
19 happen to the opt outs. It wasn't clear in the plan, it
20 certainly wasn't addressed in the settlement motions and it
21 certainly was not addressed in the disclosure statement. And
22 what we learned in that objection hearing, was that even if you
23 do opt out, you get routed right back into the trust fund,
24 pursuant to the plan.

25 So the settlement that Mr. Westbrook talks about is

1 contingent upon the plan being confirmed, as we know, and it
2 also requires that the people who opt out of this class, the
3 150 or the 190, the ones that Mr. Westbrook has not yet talked
4 to and persuaded that they were wrong, those people have a
5 right under class action law, to opt out and they should have
6 that right preserved.

7 Now, it is true that I did not object or Anderson
8 Memorial, did not object in our moving papers, because the
9 notice says, if you opt out, you don't get to object to the
10 fairness or adequacy of the plan. We voted with our feet. Our
11 silence is not to say that we support it, we voted saying we
12 want to opt out and go forward in the tort system, out outside
13 of the class plan. And there is no -- and I think some
14 background is appropriate, Your Honor.

15 And, I'm sure that the Court has read the papers,
16 talking about who Anderson Memorial is, I know the Court is
17 familiar who Anderson Memorial is, but there is absolutely no
18 doubt that we had a class action pending before the bankruptcy
19 was filed that includes residences. The reply filed by the
20 debtor is that the ZAI product was used primarily, primarily,
21 in residences. I'm not disputing that today, but there's no
22 evidence that it was not used in commercial properties, and our
23 class action said it was used, and asserted that it was in
24 commercial properties and residences, and although the adequacy
25 of Anderson was disputed below, as a class rep., the issue of

1 whether it was adequate representative for ZAI, or residences
2 --

3 THE COURT: I'm sorry, so the issue of what, I
4 apologize.

5 MR. KOZYAK: The adequacy of Anderson as a class
6 rep., that was never contested below as to these two issues,
7 residences or ZAI product.

8 So, and how this started in this bankruptcy case, as
9 the Court was familiar with our class action, Mr. Westbrook
10 filed an adversary complaint in this case, I think it's called
11 01-08810-JFK, which is styled class action complaint seeking
12 Zonolite attic insulation relief, Mrs. Jackie Lewis, et al.,
13 versus W.R. Grace, et al. On Page 23, paragraph 81, where they
14 define the class it says, all owners or occupiers of real
15 property, et cetera, and then it goes, except excluded from the
16 class are, and then there's a number of people, the class
17 certified in Anderson versus W.R. Grace and Company,
18 92-CP-25-279 South Carolina Common Pleas, Hampton County.

19 So, when they filed the class action they excluded
20 Anderson Memorial and the South Carolina class action.

21 When they did the negotiations, they excluded both
22 Anderson Memorial and the PD Committee which represents the ZAI
23 claimants, including the ones who opt in, or stay in, or don't
24 do anything and those that opt out.

25 So, since this is contingent, Your Honor, upon plan

1 confirmation, and because it does affect the rights of people
2 who have opted out, including Anderson Memorial, as class rep.
3 I believe that this should be deferred and dealt with in the
4 plan confirmation process. Both the class claimants and the
5 debtors have said, we're not trying to affect your plan rights,
6 but I do believe they are. I believe that this is a sub rosa
7 mandatory class.

8 And, Your Honor, in the Federal Mogul case that you
9 also handled, Anderson Memorial had a class action, brought
10 before the Court, strong support, no objections, the Court
11 continued it twice and rolled it over and combined it with the
12 confirmation hearing. I don't believe there's any demonstrated
13 need to go forward.

14 THE COURT: That was a different issue because that
15 class had actually been certified against Federal Mogul, this
16 one hasn't been certified against Grace. And there's a world
17 of difference. This class action, in South Carolina, has never
18 been certified against Grace and Anderson continues to insist
19 that it has and it hasn't, and that issue is -- it simply makes
20 a world of difference. Anderson, at this point, is not a final
21 certified class against Grace and the Court's opinion makes it
22 clear that it wasn't certifying the class against Grace, it
23 couldn't certify the class against Grace, Grace was in
24 bankruptcy at the time.

25 MR. KOZYAK: Before that order, that was entered

1 after Grace was in bankruptcy, Your Honor, the class was
2 conditionally certified against Grace.

3 THE COURT: Yes, conditionally certified, and not
4 finally certified.

5 MR. KOZYAK: Well, it was certified.

6 THE COURT: No. It was not certified, it was
7 conditionally certified, not finally certified. It has never
8 been adjudicated a class action against Grace on a final basis.
9 And it could not be adjudicated against Grace on a final basis
10 because Grace was in bankruptcy.

11 MR. KOZYAK: Your Honor, I don't believe there's any
12 demonstrated need to go forward and not with the settlement
13 today. I think it should be combined with the class action.
14 Mr. Westbrook and Scott in their affidavits, which I object to
15 there being introduced for purposes of evidence, it's not an
16 evidentiary hearing, if there are any contested matters, then I
17 would request a CMO and an opportunity to present evidence, but
18 they have talked to these class members, they're going to give
19 them advice as voting for the plan. That's not the issue, the
20 issue is the rights of the opt outs, and much is said as
21 there's only one person who said anything, there's only one
22 person who is standing up here. The reason is, we're the only
23 people who know about this that have opted out. The disclosure
24 statement, I don't know if it went out yesterday, or this week,
25 I remember at the disclosure statement hearing they represented

1 it was going to go out before the end of the month, today is
2 April 1st, no one would know about that. If you were an opt
3 out, you would have no idea today, that your plan -- that the
4 treatment of your case was going to be wrapped back up into the
5 plan.

6 And so for those reasons, we preserve our rights at
7 the confirmation and we seek that this hearing be deferred.

8 THE COURT: Well, there is, you know, there is the
9 complication, I think, of the bankruptcy spin here, which is
10 that if you haven't filed a claim, then this class action
11 process will, I think, provide because of the settlement, your
12 opportunity to receive something that you otherwise may not
13 have.

14 If you have filed a claim and you're an opt into the
15 class, then you'll be treated per the class. If you filed a
16 claim and you're an opt out, you're going back into the plan.
17 That's the way life is in bankruptcy.

18 So, you know, you've got -- you've basically got two
19 choices. You can opt in and be treated under the class or you
20 can file a claim and then either be treated under the class or
21 opt out and be treated under the plan, otherwise, you have no
22 claim, do you?

23 So, I don't see --

24 MR. KOZYAK: No, but, Your Honor, you follow it --

25 THE COURT: I'm sorry?

1 MR. KOZYAK: -- you follow it --

2 THE COURT: You follow --

3 MR. KOZYAK: -- you do -- you do understand it except
4 the last piece, I respect. Yes. If you're in the class, you
5 get treated under this fund.

6 THE COURT: Yes, right.

7 MR. KOZYAK: The fund that Mr. Westbrook negotiated.

8 THE COURT: Exactly.

9 MR. KOZYAK: Okay. If you opt out, you get treated
10 under the same fund. That should not be fair.

11 THE COURT: Well, no. No, if you opt out --

12 MR. KOZYAK: Because if you are PD claimant, if
13 you're a PD claimant under the plan, then you should be able to
14 be paid a hundred cents on the plan, that's the treatment and
15 that's not what is said. That is not what's provided. They
16 say if you have a ZA related claim, whether you don't say a
17 word or you opt out, stand on your head, you go back into the
18 same fund, under the plan.

19 THE COURT: Well, I mean that's a plan confirmation
20 issue, isn't it? If ZAI claimants believe that they have an
21 opt out issue, and ought to be in a different class under the
22 plan, that's a classification issue and their rights to either
23 vote against the plan, or to seek classification are still
24 preserved. That's not a settlement issue, that's a plan
25 confirmation issue.

1 So, their remedy, as an opt out plaintiff with a ZAI
2 property damage claim, is A) file a claim, and B) challenge the
3 plan and the classification under the plan. So, I don't see
4 how the settlement at that point takes away any plan
5 confirmation right, there may be a plan confirmation issue that
6 is preserved, but I don't see how the settlement does away with
7 that. You're either an opt in or an opt out under the
8 settlement and that's appropriate for class action treatment
9 under the Third Circuit standards for approving the class
10 action as final settlement.

11 So, what I'm not --

12 MR. KOZYAK: You've addressed my point.

13 THE COURT: Okay.

14 MR. KOZYAK: Thank you.

15 THE COURT: All right, Mr. Freedman.

16 MR. FREEDMAN: Yes, Your Honor. I have to confess I'm
17 not sure I understand Mr. Kozyak's point, but I think that what
18 his general message, is that there somehow is some injustice
19 being done to his client as an opt out because of the way that
20 this is working, and it seems to be that the facts just clearly
21 demonstrate that there is no such injustice.

22 It's helpful to look at it in terms of two
23 perspectives. Disclosure, that is what has been told to
24 people, ZAI claimants, since the beginning about this process
25 and the process itself, how it's going to work in terms of

1 going forward with the plan and, frankly, his rights as an opt
2 out.

3 So, in terms of disclosure, on January 16th, the
4 Court approved preliminarily the settlement and the notices
5 that were related to the settlement. In the motion that was
6 made in connection with the settlement, class counsel attached
7 the term sheet and the term sheet made absolutely clear that
8 the class claims would be paid pursuant to a trust, and that
9 that trust would be structured so as to satisfy the terms of
10 Section 524(g).

11 Subsequently -- that happened in mid-January. On
12 February 3rd, the debtors filed an amended disclosure statement
13 which was largely intended to address PD claim and ZAI claims
14 and that was the first time that the terms of this ZAI
15 resolution that are contemplated by the settlement were
16 included in the plan. And the disclosure statement makes
17 absolutely clear, starting on Page 2, right before the
18 executive summary, and this was in materials that Anderson
19 Memorial did not object to, but it was -- and it has been there
20 since the February 3rd filing, that the treatment of ZAI claims
21 would apply to all ZAI claims. That there was a plan Chapter
22 11 class created, Class 7B under the plan that applies to all
23 U.S. ZAI claims. And that created a Chapter 11 class of which
24 this settlement class is a very large subset, but entities that
25 opted out were still, and are still clearly members of the

1 that.

2 Subsequently, and when we came before the Court on
3 March 9th to get final approval of the disclosure statement,
4 Anderson Memorial came forward and it said that it wanted to
5 make clear that there was -- that this language would apply to
6 somebody that opted out, they suggested language which the
7 debtors acceded to, to resolve that problem and that took care
8 of it and now we have a mailing.

9 So, there has been complete and full disclosure since
10 at least February 3rd, and very shortly after the class motion
11 was first made, that this plan process applies to all U.S. ZAI
12 claims and to have Anderson Memorial somehow now say that in
13 some way there was some lack of disclosure, and lack of notice
14 about this, when indeed the notice that is now going out for
15 voting was notice that they helped us fashion, just rings
16 hollow.

17 Secondly, looking at the process. Every single U.S.
18 ZAI claim that filed a proof of claim will get a ballot and
19 will be entitled to vote for or against the plan. The fact
20 that they opted into the class or opted out of the class has no
21 bearing on their ability to vote for the plan. The procedures
22 that the Court approved which were not contested by anybody,
23 including Anderson, say that the class representative can then
24 cast a ballot for those people who are in the class, who did
25 not cast their own ballot, but every single ZAI claimant that

1 filed a claim and I should amend what I said, and has an
2 allowed claim or one that's permitted to vote which, frankly
3 does not apply to Anderson because there is an objection based
4 on the patent inadequacies of their claim, but every ZAI
5 claimant who has a right to vote will have the ability to vote
6 and the fact that they are part of the class makes no
7 difference.

8 Secondly, there is absolutely no limitation on a ZAI
9 claimant who has standing. Again, we would argue that does not
10 apply to Anderson because their claim is so objectionable, but
11 every ZAI claimant who has standing can come forward and raise
12 any issue about confirmation of the plan that they feel like
13 they're entitled to raise.

14 So, the fact that the opt outs are swept into the
15 plan, has absolutely no bearing on whether or not this
16 settlement should or should not be approved and I think the
17 class counsel has made a very clear and compelling case that it
18 should be approved now, so that we can go forward and allow the
19 class to function the way it ought to, to move the case
20 forward.

21 THE COURT: Mr. Lockwood.

22 MR. LOCKWOOD: Your Honor, while I don't disagree
23 with anything Mr. Freedman said, I think much of it, to some
24 extent, is beside the point.

25 THE COURT: Mr. Lockwood, I'm sorry, I'm having

1 trouble hearing you. Could you just move the microphone?

2 MR. LOCKWOOD: I don't disagree, indeed, I agree with
3 everything Mr. Freedman said, I, however, believe that much of
4 it is, in effect, beside the point because as I understand it,
5 Mr. Kozyak got up at the end of his colloquy with you, when you
6 said you have your right to object to confirmation of the plan
7 and he said, that answers my point, and that's really all this
8 is about. He's trying to get -- he tried to, in effect, get
9 you to rule on a plan issue, which is the treatment of opt
10 outs, you pointed out this wasn't the time or place to do that,
11 but that he reserved that right, he said, okay, that's the end
12 of it.

13 THE COURT: Well, I don't know that I said he
14 reserves -- I mean that Anderson Memorial reserved that right,
15 I said that opt outs.

16 MR. LOCKWOOD: Well no -- opt outs.

17 THE COURT: Yes.

18 MR. LOCKWOOD: Anybody that's opt out, as Mr.
19 Freedman said, has the right to object at confirmation, and
20 this isn't a sub rosa plan confirmation.

21 THE COURT: Right.

22 MR. LOCKWOOD: The objections may well be meritless
23 and we certainly all reserve the right to contest their merit,
24 but at the end of the day all we're here on today is the
25 approval of this settlement from the plan proponents

1 perspective. They would like to know whether or not this
2 settlement is going to be in place as part of the run up to the
3 confirmation process or not and, therefore, we would urge Your
4 Honor to approve it since there has been no intelligible
5 objection expressed to the class settlement, per se. Thank you.

6 THE COURT: Well, yes, I don't think that the
7 settlement, approval of a settlement in any way affects
8 anybody, either opt in or opt outs ability to vote on the plan
9 or object to the plan. If that's the purpose of raising this
10 issue, then I hope that ruling is clear.

11 Okay, Mr. Westbrook?

12 MR. WESTBROOK: Nothing further, Your Honor.

13 THE COURT: All right. Mr. Kozyak.

14 MR. KOZYAK: Nothing further.

15 THE COURT: Okay. The objection to the extent, then,
16 that it is one by Anderson Memorial is overruled for that
17 reason, because the objection states that it is not an
18 objection to the settlement, it is simply a request to delay
19 the approval of the settlement until the plan confirmation
20 process. I don't see the need for that because the settlement
21 does not affect anybody's ability to object to confirmation of
22 the plan or to vote on the plan. So, those issues are
23 preserved for both opt ins and opt outs and I believe that the
24 class settlement does, indeed, represent a fair, reasonable and
25 adequate settlement of the issues between and among the

1 parties.

2 In terms of the complexity, expense and duration of
3 the potential ZAI litigation, it has been going on for years.
4 The little piece of it that I did see in terms of the Science
5 trial that affected only the enumerated claims and not all of
6 the members of the class who have already opted in, let alone
7 those who may potentially or have already opted out, convinces
8 me that this litigation could go on potentially for decades,
9 not just years, and as a result I think that that factor alone
10 could probably justify settlement but, nonetheless, I think Mr.
11 Westbrook did a very adequate job in explaining all of the
12 factors that the Court is compelled to take into consideration
13 and I will accept his analysis of those factors, not just on
14 the oral argument but also in the papers that have been filed
15 by the parties in the case.

16 And so, I don't see any need to review those factors
17 here today, I simply will accept them. I will state for the
18 record that I have read those papers and I have listened to the
19 argument and based on those reviews and having heard that
20 argument today, I will accept them and the reason for my
21 overruling Anderson's objection, I think, has been made clear,
22 that the ability to object to the plan and to vote on the plan
23 is preserved.

24 So, I will take an order if someone has one,
25 approving.

1 MR. WESTBROOK: Thank you, Your Honor. Yes, Your
2 Honor, I have another copy of the order that was proposed and
3 attached to our papers.

4 THE COURT: Thank you. I think congratulations are
5 in order.

6 MR. WESTBROOK: Thank you, Your Honor.

7 UNIDENTIFIED MALE SPEAKER: Thank you, Your Honor.

8 THE COURT: All right. Items seven and eight, Ms.
9 Baer. Anyone who is interested in only that matter, are free
10 to leave, thank you.

11 UNIDENTIFIED MALE SPEAKER: Thank you, Your Honor.

12 MS. BAER: Your Honor, before we take that up, Mr.
13 Kozyak raised the issue of whether the mailing had gone out.
14 Yes, the mailing has gone out, on a timely basis, and Your
15 Honor, I'd like to hand up to you a copy of the CD that went
16 with the mailing which we have found incredibly helpful because
17 it's all bookmarked so you can find all of the plan documents
18 very easily on you computer and you don't have to carry around
19 a lot of papers.

20 THE COURT: Ah, thank you very much. That would be
21 helpful. Is this a copy that has to be left here for filing or
22 is -- thank you. Do I need to file this copy with the clerk or
23 can I take this back?

24 MS. BAER: No, Your Honor, that's your own copy.
25 We'll take care of making sure that the final documents are all

1 filed with the clerk.

2 THE COURT: All right.

3 MS. BAER: And I don't know if they want a CD but if
4 they do, we'll talk to them.

5 THE COURT: All right.

6 MS. BAER: And make sure they get what they need.

7 THE COURT: Okay. Thank you.

8 MR. KOZYAK: Your Honor, I haven't had a full chance
9 to read this. Can I -- this order.

10 THE COURT: Yes.

11 MR. KOZYAK: I object to footnote number one. I
12 haven't had a chance to look at it. Can I just -- can we just
13 look at this for five more minutes, please?

14 MS. BAER: I was going to say, isn't it the same
15 order that was attached to the papers that were filed?

16 THE COURT: It is, I believe, the same order.

17 MS. BAER: Yes. It hasn't changed.

18 UNIDENTIFIED MALE SPEAKER: Yeah, it's the same
19 order.

20 THE COURT: It's -- Anderson is concerned about the
21 lack of standing issue. Frankly, I don't think Anderson does
22 have standing to object to the class settlement, but for
23 purposes of this ruling, I don't think it's an issue. I've
24 heard Anderson's argument. To the extent that the last
25 sentence preserves the issue it says, in any event, Anderson's

1 concern with the treatment of its ZAI claim under the plan if,
2 indeed, it has, ZAI is a confirmation matter and not a reason
3 to deny approval of the class settlement. That seems to me to
4 be the basis for my ruling. Let's see.

5 I will strike the intervening two sentences and leave
6 in the first sentence and the last sentence simply because I
7 don't find it necessary at this point to rule on the standing
8 question. I will find it necessary to rule on that question
9 for plan confirmation purposes, so if Anderson thinks it has
10 standing to raise these issues, to either on its on, or to
11 represent any other building owner who may have ZAI, then I
12 want a brief on Anderson's standing for plan confirmation
13 purposes, but I don't find it necessary to rule on it now.

14 So, footnote one now reads: "One former class member,
15 Anderson Memorial Hospital opted out of the class and then
16 filed a limited objection in which it does not challenge the
17 fairness, reasonableness or adequacy of the settlement.
18 Instead, it asked the Court to defer considering settlement
19 approval until plan confirmation, Docket Number 20981 at 1. In
20 any event, Anderson's concern with the treatment of its ZAI
21 claim under the plan if, indeed, it has ZAI is a confirmation
22 matter and not a reason to deny approval of this class
23 settlement". Is that acceptable to Anderson?

24 MR. KOZYAK: Yes, thank you, Your Honor.

25 THE COURT: All right. Footnote one reads that.

1 Yes, you may take a moment to look at the rest of the order,
2 but I've made that change to the order.

3 Okay. One second until I get back to where I was
4 with respect to the CD.

5 I would suggest, then, perhaps, anybody interested in
6 the ZAI litigation remain a few minutes until Mr. Kozyak has a
7 chance to take a look at the order. So, ten minutes and then
8 I'll excuse anybody from the ZAI presentation, but meanwhile,
9 I'm going forwards with items seven and eight on the agenda.
10 Okay. Ms. Baer.

11 MS. BAER: Your Honor, items seven and eight are two
12 motions filed by Kaneb Pipeline, for lifting of the stay. The
13 debtors oppose both motions and believe that lifting the stay
14 at this time, on these matters, would be highly prejudicial to
15 the debtors for several reasons, which we will go into in our
16 response. You also have objections from CNA and a limited
17 objection from One Beacon Insurance Company.

18 THE COURT: All right, thank you. Ms. Miller.

19 MS. MILLER: Good morning, Your Honor, Kathy Miller
20 for Kaneb. Your Honor, Mr. Platt will be handling the lift
21 stay motion with respect to the appeal and Mr. Gilbert will
22 handling the lift stay motion with respect to the insurance.

23 Mr. Gilbert and Mr. Pierce have already been admitted
24 pro hac. We filed Mr. Platt's last week, but a check
25 yesterday, the order had not yet been signed and with Your

1 Honor's permission, may he address the Court today?

2 THE COURT: I actually haven't seen it but I will --
3 I'm happy to admit Mr. -- I'm sorry, whose hasn't been filed?

4 MR. MILLER: Platt, Mark Platt.

5 THE COURT: Mr. Platt's. I haven't seen it, but I'm
6 happy to admit Mr. Platt for today and I'll ask that the docket
7 be searched for it. I just haven't seen the motion.

8 MS. MILLER: Thank you, Your Honor.

9 THE COURT: Let me make a note, please. Okay. Good
10 morning.

11 MR. PLATT: Good morning, Your Honor. Again for the
12 record, Mark Platt from Fulbright and Jaworski on behalf of New
13 Star Pipeline Operating Partnership LP. I'm going to go ahead
14 and identify the full name of the client, and New Star Terminal
15 Services, Inc., which are relatively new names for respectively
16 Kaneb Pipeline Operating Partnership, LP and Support Terminal
17 Services, Inc. But for simplicity, we will refer to our client
18 as Kaneb.

19 THE COURT: All right.

20 MR. PLATT: And I apologize, Your Honor, for the late
21 filing of the pro hac papers. Mr. Gerber had planned on making
22 this argument, he got stuck handling a major filing down in
23 Dallas, and absolutely no offense to you, but I'm here in his
24 stead, and we're prepared to proceed.

25 THE COURT: All right, Mr. Platt go ahead. Thank

1 you.

2 MR. PLATT: One other piece of housekeeping, all of
3 the exhibits that we attached to our motion, they're in the
4 record, but we've placed them in some binders if that's helpful
5 to the Court.

6 THE COURT: All right, that's fine.

7 MR. PLATT: And don't fret, we will not be referring
8 to all of the exhibits this morning. And I forgot to, again,
9 announce that Mr. Bob Gilbert will be -- he will be the one
10 making the argument with regard to the insurance coverage
11 issues.

12 So, why are we here, Your Honor? On October 30,
13 2008, Kaneb received a very serious letter from the Department
14 of Justice which is attached as Exhibit K-8 to our motions,
15 seeking reimbursement of costs expended by the federal
16 government in remediation efforts in connection with a jet fuel
17 release at what is referred to as the Otis Pipe Line.

18 It's generally believed that the overall exposure
19 related to that environmental cleanup will ultimately be in the
20 \$70 to \$75 million range, potentially. The good news for Kaneb
21 which acquired certain subsidiaries of the debtor, Grace Energy
22 Corporation, or what I'll refer to today as GEC, in 1993, is
23 that any liability on the part of Kaneb is subject to direct
24 claims by Kaneb against a number of insurance policies. And
25 also, in any event, that liability, if any, is GEC's.

1 The bad news, however, is that GEC is seeking to use
2 the automatic stay here as a sword to fend off any attempt by
3 Kaneb to either assert insurance coverage claims, insurance
4 coverage claims or assert claims against GEC, even in a
5 defensive posture.

6 Even worse, at least one of the insurance carriers,
7 Continental Casualty Company is essentially invoking the
8 automatic stay on its part to prevent Kaneb from protecting its
9 property rights, arguing that any coverage litigation between
10 it and Kaneb would be "chaotic and counterproductive".

11 GEC's purported indemnity concern here is its main
12 basis as we understand it, to object to relief here. GEC
13 claims that to the extent that Kaneb asserts direct claims
14 against the insurance carriers, those carriers will turn to GEC
15 for indemnity. However, as Mr. Gilbert with discuss in detail
16 shortly, only one of the insurance carriers, One Beacon, has
17 any indemnity rights against the debtor, even potentially
18 applicable to what Kaneb is seeking in these motions. And that
19 potential obligation involves only a single policy with limits
20 of only \$5 million. And nobody contests that to the extent
21 that any of the carriers have an indemnity claim against GEC,
22 that claim will survive the bankruptcy.

23 So, GEC is merely attempting to delay the inevitable
24 here. It will have to take responsibility for its indemnity
25 obligations to the extent that they do exist some day.

1 Meanwhile, Kaneb faces immediate exposure with the
2 Department of Justice, and I'd point out that Ms. Elizabeth Yu
3 is in the courtroom today representing the Department of
4 Justice, very interested in these proceedings.

5 Kaneb intends to work with the DOJ to mediate their
6 dispute, but unless Kaneb is permitted to bring its insurance
7 claims, a discussion will only go so far to resolve their
8 dispute.

9 Kaneb submits that it is that scenario that would be
10 chaotic and counterproductive. In fact, it is almost certainly
11 in the debtors and the estates best interest not to pass up the
12 opportunity to have all parties at the table. And so, we bring
13 these two lift stay motions.

14 It's important to note that there are two facets of
15 these motions. One, we're seeking to lift the stay to pursue
16 insurance coverage with regard to two potential -- two
17 environmental issues. One with regard to the Otis Pipe Line
18 and one with regard to another site, what's referred to as the
19 Macon, Georgia site.

20 Again, Mr. Gilbert is going to address these
21 insurance coverage issues.

22 Secondly, we're seeking to lift the stay to pursue
23 the appeal in the Texas state court litigation with regard to
24 the Otis Pipe Line only. Again, I will discuss that after Mr.
25 Gilbert is done with the insurance coverage issues.

1 These are independent grounds and it's not necessary
2 to grant one if you grant the other. Before I turn the podium
3 over to Mr. Gilbert, let me give some background with regard to
4 the Otis Pipe Line and the Macon, Georgia sites.

5 What is referred to as the Otis Pipe Line is a fuel
6 pipeline -- the Otis Pipe Line issue refers to a fuel pipeline
7 release that allegedly occurred in the 1970s on the
8 Massachusetts Military Reservation in Sandwich, Massachusetts,
9 in Cape Cod. What's referred to as the Macon, Georgia site is
10 an issue with regard to some alleged jet fuel releases from the
11 pipeline in Macon, Georgia, serving Warner Robbins Air Force
12 Base.

13 Again, as I said, in 1993, there was a merger
14 agreement which is attached as Exhibit K-7, whereby, several
15 important things happened. Kaneb acquired certain GEC
16 subsidiaries, GEC pursuant to that agreement represented and
17 warranted that the subsidiaries had no environmental
18 liabilities and were in compliance with all environmental laws.
19 GEC agreed to indemnify Kaneb to the extent of a breach of
20 those warranties. And, very importantly, but operation of law
21 Kaneb became a co-insured with respect to the insurance
22 policies covering, among other things, environmental
23 liabilities.

24 So, in both motions, Kaneb seeks to lift the stay in
25 order to pursue its direct rights against the insurance

1 carriers.

2 Mr. Gilbert is going to address this in a moment, and
3 then I will address the appeal issue which is simply, with
4 regard to the Otis Pipe Line, that we're seeking to lift the
5 stay to pursue the appeal of the Texas state court action which
6 has been stayed since April of 2001, the filing of this case.
7 So, I'll now turn it over Mr. Bob Gilbert.

8 THE COURT: All right. Well, tell me about Macon
9 first, because that claim has already been disallowed or
10 stricken, so I'm not sure why at this point I'm granting relief
11 from stay as to a claim that doesn't exist any more.

12 MR. PLATT: It's with regard to the insurance
13 carriers.

14 THE COURT: Okay, but there's no claim that can be
15 pursued against the debtor, so you want to go against the
16 insurance, recognizing that you can never go against the debtor
17 for anything more than the insurance?

18 MR. PLATT: We have a direct claim against the
19 insurance carriers.

20 THE COURT: The insurance policy, okay.

21 MR. PLATT: That's correct.

22 THE COURT: All right.

23 MR. GILBERT: Good morning, Your Honor, Bob Gilbert,
24 I'll be addressing the insurance issues on behalf of Kaneb.

25 As Mr. Platt said, this motion is seeking a couple of

1 things. What I am addressing is the ability for Kaneb to bring
2 its direct claims against the insurers that we have identified
3 in the exhibits to the policy, or the exhibits to the motion.

4 What we are attempting to do is recover our insurance
5 rights, our property rights under these policies that Kaneb
6 obtained pursuant to its merger when it brought in that former
7 Grace subsidiary. That former Grace subsidiary had its own
8 separate insurance rights as a co-insured under these policies.
9 We're seeking standalone relief. So, regardless of what Your
10 Honor ultimately rules with respect to the ability of Kaneb to
11 pursue its appeal rights in Texas, that's independent of the
12 relief that we're seeking here, with respect to the insurance
13 rights.

14 And this motion does not seek to create a right or a
15 remedy that the debtors or the insurers appear to deny exists.
16 There doesn't seem to be any dispute that there are independent
17 insurance rights that Kaneb has in these policies, so what
18 we're pursuing are our own property rights, not property of the
19 estate. And that's an important point too, because all of
20 these policies, for the relevant provisions under which Kaneb
21 proposes to seek coverage, do not have aggregate limits, so
22 they only pay out on a per claim basis. The New Star claim or
23 the Kaneb claim for Otis will not diminish any of the existing
24 rights that the debtors would have in these same policies, nor
25 would the Macon claim reduce any rights.

1 THE COURT: Well, I understood the debtor to say that
2 there was no policy with respect to Macon, but I guess that's a
3 different issue.

4 MR. GILBERT: If there is no policy with respect to
5 Macon, then I am quite confident the insurers will tell us
6 there is none. We certainly believe that that is not the case.

7 THE COURT: Well, shouldn't you find that out before
8 I grant relief from stay to pursue it?

9 MR. GILBERT: Well, we do believe -- I don't know how
10 to respond to the statement that there's no coverage, or no
11 policy with respect to Macon, because, in fact, these policies
12 exist and our view is that they are -- we can't see any reason
13 why they would not be broad enough to provide coverage for each
14 of the sites at which there's potentially liability.

15 THE COURT: Well, okay. But I'm not inclined to
16 grant relief from stay as to a policy that may or may not
17 exist, that drags the debtor and the committee and this entire
18 estate into potential coverage litigation as to something that
19 doesn't exist. That makes no sense to me.

20 MR. GILBERT: The policies do exist, Your Honor. We
21 have defined the policies that we are seeking coverage under.
22 We don't know what the basis would be for any contention that
23 the policies to not exist. We've attached them. And, the
24 policies apply broadly to cover property damage liability that
25 is incurred by one of the insureds. Its' on a worldwide basis.

1 If they are aware of some exclusion that we haven't
2 seen that says that Macon is not covered, we would certainly be
3 interested to see that. But we have come forward and shown you
4 the policies and the language, the coverage grant, that
5 probably applies. So, I don't think that -- with respect, I
6 don't think that's anything that we could address any more
7 fully. There may be disputes on whether, ultimately, we are
8 entitled because of some exclusion or some term or condition
9 from getting coverage, but that's something not to be decided
10 in bankruptcy, that's the burden that we bear and the insurers
11 bear in separate coverage litigation.

12 The debtors appear to be requesting not that we don't
13 be allowed to ever pursue the insurers, but that just that it
14 be delayed to some indefinite time in the future, when the plan
15 is confirmed, it becomes presumably final on appeal, which
16 could be years and years.

17 As Mr. Platt pointed out, unfortunately, we've got
18 something that's pressing us in the face right now, which is a
19 \$71 million claim from the Department of Justice, and an effort
20 by the Department of Justice to begin engaging immediately in
21 mediation efforts.

22 So, we face present harm. Your Honor is well aware
23 of the importance of having all parties at the table in a
24 mediation and also similarly aware of the difficulty of doing
25 that where there is no pressing obligation for the insurers to

1 appear or to provide any sort of input.

2 THE COURT: And that's both as to Otis and as to
3 Macon?

4 MR. GILBERT: As to Otis, the mediation is a present
5 concern, as to Macon, the liability has largely been incurred,
6 it is continuing to grow, but \$6 million has been incurred.
7 There's not a mediation that's pending in that, Your Honor, but
8 we don't see any compelling -- as I will get into, a bit later
9 in my argument, there's no compelling reason not to join both
10 of these sites together.

11 THE COURT: Well, I'm not sure and I think for
12 purposes for this argument, it might be helpful if you would
13 distinguish the facts for me, because as I understand the
14 responses, there may be significant differences.

15 MR. GILBERT: All right. I will do that, Your Honor.
16 To put this in perspective, we are seeking approximately \$71
17 million in coverage with respect to the Otis site and
18 approximately \$7 million, \$6 to \$7 million in coverage, with
19 that amount likely to grow at the Macon site. So, we're
20 seeking approximately \$80 million.

21 We have parsed through the settlement agreements upon
22 which debtor claims create an indemnity obligation on their
23 part and our analysis and I'm sure that they will correct me if
24 I'm incorrect, is that there is only one policy with a \$5
25 million limit. An umbrella policy, not even a primary policy

1 that's even potentially implicated by the coverage that we're
2 seeking under these policies. I'll go into detail on that, but
3 there's a \$5 million nut, potentially, that is weighing down on
4 debtor, an \$80 million issue that's weighing down, currently,
5 on the debtor, so that goes to what my colleague will discuss
6 at the end of this, which is the balance of harms that each
7 side faces.

8 And so, what the issue will boil down to is, is there
9 a compelling reason to force Kaneb to wait to pursue coverage
10 until some indefinite point in the future and we think the
11 answer to that would be no.

12 The principle argument that's been raised is, if this
13 goes forward now, debtors will be thrust into a highly
14 disruptive and distracting coverage litigation. I don't think
15 that's true and I think I can demonstrate why that is.

16 As an initial matter, I've been doing coverage
17 litigation for 22 years and it is unusual, or unprecedented for
18 a co-insured to have to join all other insureds under the
19 policy who have nothing to do with the coverage issues that are
20 being litigated, who have no exposure, whose rights are not
21 going to be diminished because of the absence of aggregate
22 limits. And so as a general principle, there's no reason, and
23 none has been cited, why a co-insured, such as the debtors,
24 would be a necessary or even a useful party, or an
25 indispensable party to the coverage litigation. So, it only

1 boils down to whether the indemnities that have been alleged
2 are going to force debtor to do something that would be
3 "disruptive or justify a lengthy delay" in these non-debtors
4 pursuing their property rights.

5 Our attention has been called to nine different
6 settlement agreements that have been provided to us and upon
7 which debtors are relying and claiming that there's an
8 indemnity obligation. Three of those involve Continental
9 Casualty, which is the primary carrier from 1972 through 1985.
10 Four of those involve a Uniguard policy that was in the early
11 1970s, it's a single policy under which we're -- it involves
12 many policies, but we're seeking coverage only with respect to
13 one of those policies. And there were four separate insurance
14 settlement agreements that potentially affect that. And then
15 there are two agreements that were -- I'm sorry, there were two
16 Continental agreements and then three One Beacon agreements.
17 I'll briefly go through each of those on the relevant terms to
18 demonstrate why they don't impact what's at issue here.

19 The Seaton agreements can be disregarded out of hand.
20 The first agreement was in August 6th, 1992, and it provided a
21 release and an indemnity solely with respect to product
22 liability claims. There is no product liability issue involved
23 in what Kaneb is seeking from the insurers. So, any indemnity
24 in that agreement would be irrelevant.

25 Similarly, there was a May 15th, 1992 settlement

1 agreement. It involves asbestos and product liability claims.
2 Again, nothing in the Kaneb suit involves either of those
3 issues. The third agreement was on July 11th, 1992. It was an
4 environmental agreement, but it only involves the Hatco site in
5 New Jersey. The Hatco site is not at issue, Kaneb has no
6 involvement and never has had any involvement to my knowledge
7 with anything involving Hatco.

8 And, then finally, on March 5th, 1997, there is an
9 agreement which purported to release all environmental claims
10 that Grace had and that provided nothing more. There's no
11 indemnity obligation in that agreement.

12 And so, the concern the debtors express with respect
13 to the Uniguard settlements is non-existent. There is no
14 indemnity in the only agreement that pertains to the subject
15 matter for which Kaneb is seeking coverage.

16 There are two separate Continental agreements that
17 were entered into and, similarly, for reasons I'll explain,
18 those are of no moment here. On May 30th, 1997, there was an
19 agreement that released and created an indemnity with respect
20 to number one, the Hatco site which is irrelevant here and,
21 number two, claims under a provision of the Continental
22 policies that provided what are called gradual pollution
23 limits.

24 Now, we didn't attach the gradual pollution limits to
25 the policy excerpts and the reason is, we have no intent at

1 this time to seek coverage under the gradual pollution limits.
2 Those are sub-limits that appear to provide X amount of
3 coverage, subject to an aggregate limit, we understand that
4 payments have been with respect to those gradual pollution
5 limits, that there has been a complete release and in theory
6 and exhaustion of those, we have no ability to independently
7 verify those, but we are willing to stipulate on the record
8 that our claims have never involved, and at this time we will
9 agree that the stay will not lift with respect to any claim
10 involving gradual pollution limits.

11 Instead, the only thing that Kaneb is seeking
12 permission to do at this time is to pursue coverage under the
13 Continental primary policies with respect to the general
14 liability limits for property damage, which are not subject to
15 aggregate limits and which are subject to providing coverage
16 for sudden and accidental releases of contamination.

17 So, we can -- and we will file a stipulation to that
18 affect, or the order could so reflect, gradual pollution limits
19 are not something that we have any interest in. There's no
20 other indemnity obligation under that agreement. Hatco,
21 gradual pollution limits, but nothing else.

22 And then the second agreement is December 14th, 2004
23 and that releases all insurance coverage for environmental
24 claims against W.R. Grace and its affiliates, but only "to the
25 extent that W.R. Grace has the legal capacity to bind such

1 entities". That's right out of the agreement.

2 In 2004, that was 11 years after the merger
3 transaction, W.R. Grace no longer had any ability to bind
4 Support Terminal Services and, therefore, on its face, that
5 agreement does not apply, the release does not apply and the
6 indemnity does not apply to any claim that Kaneb, which could
7 not be bound by Grace, might have under these policies.

8 And so, that finally brings us to the One Beacon
9 Insurance policy. One Beacon is the new name for American
10 Employers' Insurance Company. They issued one policy that is
11 on the list of policies that we're seeking to get coverage
12 under. That policy was very early in the 1970s, it's an
13 umbrella policy, it has \$5 million in limits and there is an
14 agreement dated October 7th, 1998, pursuant to which the
15 debtors agreed to defend and indemnify One Beacon with respect
16 to any entities claim under that particular policy was well as
17 several other policies under which we are not seeking
18 permission to pursue coverage at this time.

19 But with respect to that one policy, it appears to us
20 that yes, there would be an indemnity obligation. Debtors may
21 have their own defenses to it, but we're not going to stand
22 here and argue that there does not appear to be one, that there
23 does appear to be an indemnity obligation under that. So, the
24 issue really boils down to, could one indemnity obligation,
25 under an umbrella policy, not even the principle policies that

1 we would be pursuing in the first instance for defense costs,
2 but under the umbrella policy, for \$5 should that tail allow
3 the -- be allowed to wag the entire dog of the claim that we
4 want to bring against 58 insurance policies, issued by 19
5 different insurers, for close to \$80 million in coverage, a the
6 two sites.

7 So, that, I think, really puts it into focus in
8 weighing what the balance of harms would be. We think the
9 balance of harms plainly favors Kaneb in this case. The DOJ
10 mediation of the massive pipe -- of the Otis Pipe Line matter,
11 would presumably occur this summer, that appears to be what the
12 DOJ is pressing for, and as experience dictates, meaningful
13 success at the mediation is impossible without meaningful
14 participation by our insurers. Meaningful participation by
15 insurers never happens if they don't have any obligation to
16 participate at that point. It would simply be unfeasible to
17 expect that they would show up and we certainly would have no
18 means to push them or demand that they show up in this case.
19 So, we think that it's essential that we be allowed to formally
20 pursue our insurance rights against those insurers.

21 There is no dispute that Kaneb has its own separate
22 rights in these policies, nor is there any dispute that
23 recovery by Kaneb would diminish any of the debtors' rights in
24 those policies, thus, this relief doesn't implicate any
25 property of the bankrupt estate. And it's, for that reason, we

1 think that it's a very tenuous proposition that we should be
2 barred in any instance from pursuing these policies.

3 And, not even the debtors dispute Kaneb's legal
4 entitlement to pursue these insurance claims. So, the only
5 question is whether debtor will suffer any serious distraction
6 by reason of that one indemnity obligation that they would have
7 under the One Beacon or American Employers' policy.

8 They complain about the distraction being dragged
9 into these cases, but I think that concern is widely overblown.
10 Putting any putative indemnity concern to one side for the
11 moment, debtor is not a necessary or indispensable party.
12 There's literally no reason other than the indemnity for
13 debtors to be involved. Looking at the indemnity, it's only
14 one policy out of approximately 58.

15 THE COURT: Yes, you've said that. Do you want to
16 tell me something new?

17 MR. GILBERT: Yes, okay. I do want to get to the
18 issue of what their participation would look like. Their
19 involvement would be minuscule, perhaps, reimbursing the costs
20 of one of the 19 carriers who involve the defense costs -- who
21 is involved or they could step in and take over the defense,
22 however, the indemnity provides that the insurer has the right
23 to dictate what positions would be taken with respect to
24 insurance policy interpretation issues.

25 Finally, this is a very specialized form of

1 litigation and it would be very unlikely that the lawyers
2 involved in representing W.R. Grace in the bankruptcy
3 proceedings, would be involved with respect to this lawsuit, it
4 would be a different set of attorneys. And, finally, it would
5 be an immaterial exposure to the debtors, \$5 million which in
6 the context of this multibillion dollar bankruptcy, we just
7 don't think that that would create a financial distraction or
8 chaos.

9 So, for that reason, particularly with respect to the
10 Otis Pipe Line site, we think it's essential that we proceed
11 immediately.

12 With respect to the Macon site, the issue is very
13 simple. The exposure to date is approximately \$6 million, and
14 since we are stipulating not to pursue the gradual pollution
15 limits at this time, under the Continental policies, the risk
16 of debtor getting entangled in this litigation, in any
17 meaningful way, is very low because the policies available
18 under the Continental -- the limits available under the
19 Continental policies are more than double the exposure that we
20 have. So, whether we would even reach the One Beacon policies,
21 the One Beacon policy, is not at all clear. So, we think that
22 there is de minimis risk of debtor being entangled in any
23 meaningful way.

24 So, for that reason, we would request that the stay
25 be lifted with respect to the insurance claims.

1 THE COURT: Okay. I'm going to defer, Mr. Platt, the
2 rest of your recitation until I hear the ZAI issues, since
3 there are people who have to catch planes and I see they are
4 still here. So, I'm going to just defer to go back to that for
5 a minute. Mr. Westbrook.

6 MR. WESTBROOK: Yes, Your Honor. We have solved
7 Anderson's problem for today by agreeing to insert the word
8 class in two different places in the proposed order.

9 The first, Your Honor, is at the top of Page 4, in
10 the second line after the word ZAI, just put the word class in
11 there, so it reads U.S. ZAI class claimants.

12 THE COURT: All right.

13 MR. WESTBROOK: And then the other place, Your Honor,
14 is on the final page, Page 5, first line, the Court also finds
15 that the -- in front of the word settlement, put the word class
16 settlement.

17 THE COURT: Okay. That's a bit redundant. That's,
18 obviously, what I'm approving but fine. Mr. Freedman, does the
19 debtor have any objection to those?

20 MR. FREEDMAN: No objections, Your Honor.

21 THE COURT: Mr. Lockwood, does the committee have any
22 objection?

23 MR. LOCKWOOD: No, Your Honor.

24 THE COURT: Anybody have any objection?

25 (No audible response)

1 THE COURT: Okay. Does anybody have any objection to
2 the modification I was making to footnote one?

3 MR. WESTBROOK: Not from the class, Your Honor.

4 THE COURT: Okay. Then I am -- I have signed the
5 order with those modifications.

6 MR. WESTBROOK: Thank you, Your Honor.

7 UNIDENTIFIED MALE SPEAKER: Thank you, Your Honor.

8 THE COURT: All right, thank you. Mr. Platt, I'm
9 back on the record on items seven and eight again, thank you.

10 MR. PLATT: Thank you, Your Honor, and before I get
11 to the appeal, just one thing that I will mention is that Mr.
12 Gilbert did bring copies of the settlement agreements that have
13 been referenced and that were brought to our attention by the
14 debtor. They were produced to us pursuant to a protective
15 agreement, not an actual protective order, and so we are
16 prepared to present them to you if it would be helpful for you
17 to see -- if this argument alone was not enough to explain why
18 there really is only one policy that is at issue indemnity
19 wise.

20 THE COURT: Okay. Well, I think I need to find out
21 whether that's disputed before I need to see it.

22 MR. PLATT: Sure, sure.

23 THE COURT: Okay.

24 MR. PLATT: I just thought I'd bring that to your
25 attention.

1 THE COURT: All right.

2 MR. PLATT: As to the appeal, Your Honor, I will be
3 brief, because the papers explain the history of the appeal.

4 In 1997, GEC filed suit against Kaneb seeking
5 declaratory relief that Kaneb, not GEC, was responsible for
6 alleged liabilities associated with the Otis Pipe Line.

7 At issue were whether the Otis Pipe Line was owned by
8 GEC's subsidiary, acquired by Kaneb, pursuant to the merger
9 agreement; GEC's indemnity obligation for inaccurate
10 representations and warranties, and damages for breach of the
11 merger agreement.

12 In August of 2000, a jury trial took place and the
13 state court judgment was entered declaring that the liability
14 for the Otis Pipe Line release had transferred to Kaneb, that
15 GEC did not owe indemnity to Kaneb for any liabilities related
16 to the Otis Pipe Line and that neither party was entitled to an
17 award on its affirmative defense claims.

18 In October of 2000, both sides timely filed notices
19 of appeal, however, no briefing has taken place in that appeal
20 as a result of the automatic stay that has been in place since
21 April of 2001.

22 So, the question is, should the stay lift for that
23 appeal to proceed. I think there are three things that you
24 need to look at. One, prejudice to the debtor; two, the
25 balance of harms; and three, the likelihood of success.

1 The debtor is essentially -- as far as the prejudice
2 to the debtor, the debtor is essentially claiming that it would
3 be an annoyance to have to pursue this appeal along with us and
4 nothing more than annoyance, they would have to, not --
5 probably not the bankruptcy counsel, but other counsel would
6 have to file papers in the appeal. So just as with the
7 insurance coverage issue, if we are not permitted to proceed,
8 this could potentially affect the impact of the Department of
9 Justice dispute. And that's why the balance of harm here
10 significantly is on the side of Kaneb.

11 Kaneb would be subject to issue preclusion and faced
12 with tremendous potential liabilities here, without any
13 recourse. I think that you will need to look no further than
14 the In re Wilson case, out of the Third Circuit. In In re
15 Wilson, a litigant who lost a malicious prosecution lawsuit in
16 the trial court sought to lift the stay to pursue that appeal.
17 The bankruptcy court denied the motion and the district court
18 affirmed the bankruptcy court's denial and the Third Circuit
19 reversed, holding a couple important points.

20 On the issue of preclusion point, the Third Circuit
21 held that if the bankruptcy continued without stay relief on
22 behalf of the malicious prosecution litigant, the issue
23 preclusion would prevent the potential creditor from
24 challenging the affect of the state court judgment in the
25 bankruptcy.

1 The court also discussed the Rooker-Feldman doctrine,
2 which, of course, prohibits lower federal courts from sitting
3 as effective courts of appeal for state court judgments. Since
4 the litigant in that case could not re-litigate the adverse
5 trial court judgment in bankruptcy court, she would have no
6 opportunity to challenge the adverse judgment before the
7 bankruptcy proceedings were complete.

8 The same situation is here, Your Honor. If this
9 bankruptcy continues without any relief from stay and, again,
10 that could happen indefinitely, Kaneb will be faced with not
11 being able to assert claims against GEC, even in a defensive
12 posture.

13 Likelihood of success. We have to keep in mind no
14 briefs have been filed in this appeal, so it is, perhaps,
15 premature to discuss the merits of the appeal. I will say, of
16 course, that Kaneb believes very strongly that it has very
17 strong points on appeal, but the real success here would be
18 certainty. Kaneb would like the appeal to conclude, but the
19 debtor here wants indefinite uncertainty.

20 THE COURT: Well, I think the debtor is convinced
21 that it has certainty. It has a judgment, what more does it
22 need?

23 MR. PLATT: Well, it asserts that the discharge would
24 not affect our ability to assert defensive -- to assert claims
25 in a defensive posture, and that's essentially what we want

1 stay relief from an order to do.

2 We recognize that from an affirmative standpoint,
3 we're in a difficult position, but from a defensive posture, as
4 it relates to the DOJ issue, there is a potential for issue
5 preclusion that if the stay is allowed to continue, we will not
6 be able to challenge. And so --

7 THE COURT: Wait, I'm sorry, say that again.

8 MR. PLATT: Well, the debtors' position is that the
9 discharge injunction will not affect our rights to assert a
10 defensive position. Recoupment.

11 THE COURT: Right.

12 MR. PLATT: Assert recoupment rights.

13 THE COURT: Okay.

14 MR. PLATT: And --

15 THE COURT: Recoupment rights as to what?

16 MR. PLATT: Recoupment rights as a basis for the
17 appeal.

18 THE COURT: They -- recoupment rights for what?

19 MR. PLATT: Recoupment rights -- well --

20 THE COURT: For the Otis cleanup?

21 MR. PLATT: Yes.

22 THE COURT: Even though -- you've suffered an adverse
23 judgment.

24 MR. PLATT: We have suffered an adverse judgment and
25 we'd like --

1 THE COURT: Right. That says that you don't have any
2 rights against the debtor.

3 MR. PLATT: If the stay is lifted, we will have an
4 opportunity to pursue that appeal, though, Your Honor.

5 THE COURT: But you haven't filed a proof of claim.
6 So, no matter how you get it, how you get to it, you have no
7 rights against the debtor, even affirmatively, or defensively.

8 MR. PLATT: Well, Your Honor, we do have -- the
9 merger, pursuant to the merger agreement, the indemnity rights
10 that -- we do have mutual indemnity rights between Kaneb and
11 the debtor.

12 THE COURT: Wasn't there a time limit with respect to
13 those rights?

14 MR. PLATT: No, Your Honor. Well, that was stayed
15 because of the automatic stay.

16 THE COURT: Indemnity rights are stayed?

17 MR. PLATT: Yes, Your Honor.

18 THE COURT: Okay. I thought -- maybe I misread the
19 information. I thought the merger agreement was in 1993, and
20 the indemnity rights lasted for five years, the bankruptcy was
21 filed in 2001, so the indemnity rights would have expired in
22 1998, therefore, they were gone. Section 108 doesn't reinstate
23 rights that have already expired. There are no indemnity
24 rights.

25 MR. PLATT: But, Your Honor -- but litigation was

1 pending.

2 THE COURT: So?

3 MR. PLATT: So that stays the rights.

4 THE COURT: What litigation was pending, the appeal?

5 MR. PLATT: The appeal.

6 THE COURT: Because the adverse judgment terminated
7 the rights, because you lost. So, unless the judgment is
8 reinstated --

9 MR. PLATT: Right, but we perfected our appeal, Your
10 Honor.

11 THE COURT: You perfected the appeal, prepetition, by
12 filing the appeal, which is stayed.

13 MR. PLATT: Correct. That's correct.

14 THE COURT: And so the debtor can deal with whatever
15 rights the debtor thinks you have in the plan. You haven't
16 filed a proof of claim. So, why on earth should the appeal go
17 forward when you haven't filed a proof of claim, and the plan
18 can deal with the issue, whatever the contingent rights may be,
19 because they've been lost because your client hasn't filed a
20 proof of claim. What benefit would there possibly be to
21 allowing an appeal to go forward?

22 MR. PLATT: Well, Your Honor, the appeal -- the
23 reason the appeal should be able to go forward and, again,
24 unlike the insurance claims, we do not seek, necessarily seek
25 the immediate lifting of that stay, we would be willing to wait

1 until, perhaps, October of this year, which is past the time
2 that, I believe the current plan hearing is set, but -- and so,
3 we're willing to give the debtors some relief on that issue but
4 the reason it would be -- it's necessary from Kaneb's
5 perspective for the appeal to go forward, is that if we are not
6 allowed to assert our position, again, from a defensive
7 posture, then we are potentially subjected to issue preclusion
8 that the DOJ could assert against us.

9 THE COURT: But -- even if you're successful on
10 appeal, as against the debtor, you haven't filed a proof of
11 claim and the bar date is gone. So, even if you win on appeal,
12 and can retry the case, and get a judgment, you can't collect.
13 So, there's absolutely no point in pursuing an appeal that
14 would allow you, even if you win, to go back, retry the case,
15 get a judgment and not be able to collect it against the
16 debtor. That is a waste of all kinds of resources, not just
17 the debtors, but judicial, at all levels.

18 MR. PLATT: But --

19 MR. GILBERT: Your Honor, if I may, there would be
20 one insurance aspect that would be --

21 THE COURT: I'm not talking about the insurance, I'm
22 talking about the rights against the debtor, which is what Mr.
23 Platt is arguing. You've told me about the insurance.

24 MR. GILBERT: But there would be another aspect of
25 the insurance. To the extent we obtain a judgment against the

1 debtors in the Texas appeal, at that point, precedent which we
2 have cited in our papers, would permit us to pursue the debtor
3 nominally, in order to procure any insurance rights that they
4 would have with respect to that obligation.

5 THE COURT: Yes, I understand as to insurance, that
6 there may be some right, but there's certainly, absolutely no
7 need to make the debtor defend an appeal at this point in time
8 to allow some other third party to pursue insurance rights.
9 There's absolutely no need to derail a potential plan process
10 for that, especially when this case has been going on for,
11 tomorrow, the end of eight years and Kaneb hasn't seen fit to
12 come forward this long, to pursue that issue. And we're now,
13 hopefully, near the end of this process. There's simply no
14 need for this.

15 MR. PLATT: And, Your Honor, just to address the non-
16 filing of a proof of claim, that simply meant that Kaneb did
17 not assert a right to payment.

18 THE COURT: Yes.

19 MR. PLATT: That did not affect our rights with
20 regard to say, declaratory judgment relief that's been asserted
21 against us and our rights to seek to overturn that.

22 THE COURT: The declaratory judgment relief asserted
23 by the debtor against Kaneb. I'm sorry, declaratory judgment
24 --

25 MR. PLATT: Declaratory judgment relief that's been

1 asserted against Kaneb.

2 THE COURT: By?

3 MR. PLATT: By the debtor.

4 THE COURT: Okay, but that's -- regardless, I've just
5 stated that issue. Regardless of who started the lawsuit, the
6 result of the lawsuit was that Kaneb lost. Even if Kaneb wins
7 on appeal, and the process starts all over again, Kaneb has not
8 filed a proof of claim. This bankruptcy and the discharge are
9 forever going to resolve that issue. The debtor is never going
10 to be liable for that claim, regardless, because it was a
11 prepetition claim, regardless of how that lawsuit ends up.

12 Now, as to the debtors' insurers, the need to name
13 the debtor nominally to pursue insurance, that may be a horse
14 of a different color at some point, but there is certainly no
15 need to start that process now. This lawsuit has been pending,
16 the appeal has been pending since 2000, this is 2009. I mean,
17 there is no reason why, that this Court can see, that there's
18 any urgency for taking a look at that issue now.

19 MR. PLATT: And, Your Honor, I hear you, and, again,
20 our argument with regard to the appeal is, the debtors'
21 position is that we should wait indefinitely to pursue our
22 rights with regard to the declaratory judgment relief, and we
23 are seeking some certainty at some point in time, which at this
24 point, we're unable to get the way the current plan is
25 structured.

1 So, and with that, Your Honor, I will --

2 THE COURT: That one I didn't follow, Mr. Platt,
3 maybe I didn't -- maybe I'm not familiar with the treatment
4 under the plan, I'm sorry.

5 MR. PLATT: Well, in the sense -- I'm sorry. In the
6 sense that if this -- the automatic stay could go on for years,
7 to the extent that the plan is confirmed and yet appealed.

8 THE COURT: Oh, Mr. Platt, we're going to resolve the
9 plan issues, to get to final confirmation, after all this time.
10 Hope springs eternal.

11 MR. PLATT: Well, I'll take that for what it is, Your
12 Honor.

13 THE COURT: Okay.

14 MR. PLATT: So, just to conclude and also to
15 crystalize the distinction between the insurance issues, again,
16 and the appellate issues, we would ask you to look broadly at
17 the balance of harm. Again, Kaneb is being put in a position
18 of \$70 to \$75 million, perhaps, \$80 million, of exposure
19 immediately, and what the debtor is likely to argue is that
20 they should not have to be bothered with the annoyance of any
21 of, even the insurance litigation, even though that will not be
22 a direct litigation against the debtor.

23 We are seeking the immediate lifting of the stay to
24 pursue the insurance coverage. We're willing to wait some time
25 with regard to the appellate issues. We would prefer not to

1 wait for some indefinite period of time with regard to the
2 appellate issues.

3 And, again, as I stated, depending on what the debtor
4 and the insurers get up and say, we do have the settlement
5 agreements that have been referred to.

6 THE COURT: All right. Thank you.

7 MR. PLATT: Thank you, Your Honor.

8 THE COURT: Ms. Baer.

9 MS. BAER: Your Honor, with regard to the Texas
10 appeal, I don't think there's really very much I need to say in
11 light of what you already have said. Just a couple points
12 there.

13 The Texas appeal, the problem is, Kaneb lost. The
14 problem is, Kaneb lost and the EPA has done the cleanup and
15 they want to get reimbursement. And those are just simply the
16 facts of the case. Kaneb cannot assert an affirmative claim
17 against the debtor because they didn't file a claim by the bar
18 date. All Kaneb can do is really defend themselves if the
19 appeal ultimately goes forward, nut, Your Honor, it makes
20 absolutely no sense as you've indicated for that appeal to go
21 forward now and there would be a lot of prejudice to the
22 debtor.

23 We are, of course, in the posture of being in the
24 throes of confirmation discovery and litigation. Over 50
25 affirmative written discovery demands have been made of the

1 plan proponents, that doesn't even count the ones the plan
2 proponents have served, or the ones that third parties have
3 served on each other.

4 Ninety witnesses have been designated as potential
5 witnesses for the confirmation hearing and we hope that won't
6 ultimately be the case, but we are in the throes of this and
7 this would be a tremendous distraction, frankly, Your Honor.

8 The assistant general counsel of Grace in charge of
9 litigation is in charge of this litigation. He also happens,
10 as his number one job, to be to get this company out of
11 bankruptcy. He supervises all the Chapter 11. The
12 environmental lawyer at Grace who is involved in Kaneb today,
13 was not at Grace when this litigation took place, nine and ten
14 years ago.

15 Your Honor, under those circumstances, there's
16 extreme prejudice and the balance of harms here, Your Honor,
17 there's no question. Kaneb has been in this position for a very
18 long time, they didn't file a claim. They do have to deal with
19 the DOJ, and they are currently responsible. And that is
20 simply a fact of the case.

21 Your Honor, the DOJ has contacted all parties about a
22 mediation. We have not yet responded but we have indicated to
23 the DOJ that Kaneb seeks to point the finger at Grace, Samson
24 Hydrocarbons, who is another party involved here, seeks to
25 point the finger at Grace and the insurers, which I'll get to

1 in a moment, seek to point the finger at Grace.

2 If a mediation does go forward, Grace will be forced
3 to participate. We don't have a choice. We're not a
4 potentially responsible party, we're not a party to any of the
5 current proceedings over that but everybody is pointing their
6 finger at Grace, which is also the case when we get to the
7 insurance issues.

8 Under those circumstances, Your Honor, there's no
9 question that the prejudice far outweighs -- the harm to Grace
10 far outweighs Kaneb's prejudice.

11 And, Your Honor, the likelihood of success on the
12 merits here for Kaneb is not good. This was a jury trial, Your
13 Honor, and it was a jury verdict and appellate courts are very
14 loathe to overturn jury verdicts.

15 In addition to that, there were motions for
16 reconsideration filed by Kaneb, there were motions to alter and
17 amend filed by Kaneb and, essentially, ultimately, the judgment
18 was entered, finding that Kaneb is responsible for these
19 environmental liabilities.

20 Under these circumstances, Your Honor, there really
21 is no grounds for lifting the stay so that the Texas appeal
22 could go forward.

23 I now want to turn to the insurance issues and at
24 least clear up a little bit of confusion. Your Honor, the
25 Macon, Georgia site and the Otis Pipe Line site are both part

1 of the same merger transaction. And in that respect the
2 insurance coverage is identical.

3 THE COURT: They're part of the same what, I'm sorry?

4 MS. BAER: They're part of the same transaction. The
5 merger that took place in the 90s included both sites, and the
6 responsibility for both sites and, therefore, all the insurance
7 coverage that related to Otis Pipe Line also relates to the
8 Macon site.

9 Your Honor, part of Kaneb's papers was an affidavit
10 from Ellen Presby, which is actually very interesting and very
11 enlightening, because in that affidavit she laid out the
12 insurance coverage that Kaneb seeks to tap into, in a way that
13 is much more logical than just listing various carriers. She
14 laid it out in terms of the primary policies and the excess
15 policies and the dates that are covered here.

16 Your Honor, the primary policies that are applicable
17 here, are all CNA policies. CNA has made it perfectly clear
18 that they believe that they have settled all liability with
19 respect to these policies and that they have an indemnity from
20 Grace and that Grace will be responsible for indemnifying them
21 in the event that there are, in fact, any obligations owing to
22 Kaneb. We don't agree, Your Honor, we don't agree that we have
23 that kind of indemnity. We agree that the -- we believe that
24 the indemnity is more limited.

25 Frankly, I don't know how to react to Kaneb now

1 saying that they will stipulate that gradual pollution coverage
2 is not implicated. I know that from CNA's perspective and they
3 are here and they are an objector and they are objecting to the
4 automatic stay being lifted, CNA is pointing the finger at
5 Grace, saying it's our responsibility, that we have an
6 indemnity and that there's no more coverage. We do know that
7 there were settlements, we do know that there are settlements
8 for some coverage, we also do know that there is pending and
9 stayed in the New York state court system, major coverage
10 litigation with CNA that's implicated here.

11 And we also know that Your Honor has no desire to get
12 involved in coverage disputes. And lifting the stay here is
13 going to come right back into your lap because there are going
14 to be coverage disputes, and there are going to be disputes
15 about the debtors' participation and the debtors'
16 responsibility and, again, this is a horrible time to get
17 involved in serious coverage litigation with CNA, which is what
18 lifting the stay would do.

19 Your Honor, if you look, then, forward to -- after
20 the primary policies, comes the excess policies and, Your
21 Honor, for the period of time here, when this spill occurred,
22 the American Employers' policy is the first excess layer policy
23 and that is, in fact, the one that's been settled, there is a
24 settlement agreement, and there is a full indemnity and Grace
25 does not dispute that.

1 The second layer is a Home Insurance policy which,
2 Your Honor, has also been settled. And it's, in fact,
3 indicated that on the plan exhibit that lists the various
4 settlement agreements, it's also on there. Home Insurance has
5 not been participating in this matter with respect to Kaneb,
6 but I'm certain they would have a lot to say about that, once
7 they realize that Kaneb wanted to come after them.

8 Your Honor, when you move down Ms. Presley's
9 affidavit, or Presby's affidavit, excuse me, you see again now
10 the insurance policies are listed by dates and by coverage
11 layers. I am not an insurance lawyer, I don't desire to become
12 an insurance lawyer. I understand that this is very
13 complicated to figure out which layer applies and how and you
14 have to exhaust the primary before you get to the next one.
15 And under those circumstances, Your Honor, Kaneb can say all
16 they want about these 19 different insurance carriers, but the
17 fact of the matter is, in the first instance this comes down to
18 litigation with CNA and One Beacon, over coverage because those
19 are the primary and first sources of insurance here and until
20 that's done, you don't even get to whether or not the other
21 layers would apply.

22 Your Honor, under these circumstances, I guarantee
23 you that lifting the stay means that you will hear end upon
24 end, on every omnibus hearing, all of the problems and all of
25 the issues and all of the complications that are involved with

1 the debtor, and CNA and the other carriers, implicating the
2 debtor and implicating indemnities and settlement agreements
3 and whether or not certain coverages apply.

4 THE COURT: The litigation in Texas that Kaneb lost
5 is the same litigation that they're now trying to access
6 insurance coverage, saying that the debtor has an indemnity
7 when a jury verdict has told them that there is no indemnity?
8 Is it the same series of transactions?

9 MS. BAER: Yes, Your Honor.

10 THE COURT: Well, if there's no indemnity whether --
11 but Kaneb is saying there's a direct action against the
12 insurance companies even though there's no indemnity.

13 MS. BAER: Right.

14 THE COURT: So, the issue is that Kaneb -- and the
15 debtor is not contesting that through the merger Kaneb has
16 direct access to insurance coverage?

17 MS. BAER: No, Your Honor. We're not admitting that.
18 We have not taken a position on that. Frankly, I think that,
19 in and of itself, is another complication as to whether or not
20 Kaneb has direct access and I know that CNA certainly is
21 challenging whether they have direct access. I think there's a
22 serious question as to whether they have direct access and what
23 it would be and that, Your Honor, is coverage litigation.
24 That's what it's all about. Whether they have direct access,
25 whether or not they are in an exception to the direct access,

1 whether or not the coverage is applied to what they're
2 claiming, all of these coverage issues would be implicated and,
3 no, the debtor has not taken a position, we do not agree that
4 they necessarily have direct action against these insurance
5 carriers.

6 You know, Your Honor, every time I represent a debtor
7 I get an insurance company saying exactly the same thing. We
8 just want to name you nominally, you're not involved, we just
9 want to go after your carriers, and every single time it comes
10 back to the debtor. That's exactly what we have here, Your
11 Honor, and under these circumstances, of all times, this would
12 be the worst time to lift the automatic stay, so that either
13 that litigation or the insurance coverage matters could go
14 forward. Thank you.

15 THE COURT: Ms. DeCristofaro.

16 MS. DeCRISTOFARO: Good afternoon, Your Honor. I
17 think Ms. Baer is quite right, we do think this is Grace's
18 problem. I will start out by saying that as Your Honor has
19 probably gleaned from all of us over the years, there was a
20 tremendous amount of Grace insurance coverage prior to this
21 bankruptcy.

22 In particular, there were two cases involving
23 environmental property damage claims. The claim that -- the
24 indemnity claim that we assert here arises from one of two
25 parallel litigations that were going on. In one, there was a

1 particular site at issue, in which the insurers were third
2 partied in and the second was a global, it was deemed by the
3 judge, by Judge Martin in the Southern District, to be a global
4 environmental coverage litigation. That litigation began in
5 1988 and Your Honor signed off on the final settlement
6 agreement in 2004.

7 That's how long and complicated the issues arising
8 from settlement took. It took from 1988 to 2004.

9 I did want to point out to Your Honor, Page 4 of
10 Kaneb's papers. Although they come now saying that they
11 require precedence because of this situation, their recitation
12 on Page 4 says, they were aware of these liabilities, for which
13 Your Honor signed off on a specific release for the Otis Pipe
14 Line site, from Grace to us, from the 90s, while the coverage
15 litigation was going on, before a settlement was reached. And
16 Ms. Baer has pointed out and we agree, there is issues as to
17 whether or not they're entitled to coverage.

18 Certainly, one of the things that we're certainly
19 going to need Grace on is the corporate transactions. It's not
20 clear to us by virtue of these corporate transactions that they
21 have any rights under those policies. There's also issues,
22 since the coverage litigation seeking a declaration of the
23 rights with respect to these sites, was pending while they were
24 still a part of Grace, whether or not they are bound by this
25 settlement or not. The earlier settlements.

1 Now, one thing that I found throughout this whole
2 recitation was the selectiveness and the misleading
3 presentation by Kaneb right now. You have a party here who has
4 obviously waived certain of their rights and they're now trying
5 to resuscitate things.

6 What they -- they deliberately left out key parts of
7 the policy that affect the settlement and affect our claims
8 against Grace. They're saying to you, oh, we're not claiming
9 against the gradual pollution limits, however, the policies
10 say, notwithstanding the other limits, this is the limit for
11 gradual pollution. So, it's not there is an either or, and
12 they can waive gradual pollution, if the claims are property
13 damaging claims arising out of gradual pollution limits,
14 they're done, they're over, they're exhausted, Grace agreed
15 with us after many years of coverage litigation, and they owe
16 us an indemnity for that, because that's what we wanted, we
17 wanted to be done with it after all those years.

18 So, we have, yes, the original agreement with Grace
19 was dated May 30th 1997 and in that, a highly contested matter,
20 we agreed that we would make a payment and they agreed that's
21 it, claims for gradual pollution are done. What happened was,
22 we kept open the dispute with respect to defense costs, global
23 litigation in New York that continued until Your Honor signed
24 off on the settlement agreement in 2004, which resolved all.

25 Included in the 2004 settlement agreement was a

1 provision that everything that was in the 1997 agreement would
2 continue to apply, which meant our indemnity, and specific
3 releases for sites that were included in multiple litigations.
4 That included the Otis Pipe Line site. So when they stand up
5 and say, oh, we have a right to pursue the appeal against Grace
6 because we have a claim as a judgment creditor, they do not.
7 Grace released us. They have no rights as a judgment creditor
8 against Grace, that was part of the settlement agreement Your
9 Honor approved.

10 So, in our view, this is Grace's problem. This is
11 not our problem. We litigated long and hard and resolved these
12 issues and Grace does owe us an indemnity and, Your Honor, we
13 did set out our -- the other thing that I find extremely
14 misleading here is, you have parties who have been litigating
15 since the 90s, about a site that we know nothing about.
16 They're carrying on that they would not involve the debtor, but
17 apparently there's a huge case regarding this site, apparently
18 they've known since 1995 that they're being pursued to that.
19 We found 40 documents going back quite some time that they have
20 tons of information that show that this is a leaking pipeline
21 case. Multiple leaks, over a period of time. And, in fact, as
22 we pointed out to Grace, the regulatory authority said it had
23 to be going on for a long time. This is a document dated
24 1995, they know this.

25 So, there's a lot left out in the Kaneb presentation

1 here with respect to the coverage that's inapplicable, to how
2 the settlement agreements work and to their rights as a
3 judgment creditor, they have none, because Grace has no further
4 rights against us.

5 We totally disagree that this would be any kind of
6 streamline litigation. We pointed out there are still, after
7 nearly 30 years, coverage points left. To the extent they
8 weren't settled by the 2004 settlement agreement, they are
9 still in a coverage action that was stayed as a result of the
10 bankruptcy filing and, in fact, we've asked in the past whether
11 we should proceed with that, however, in the current plan,
12 Grace purports to assign the rights to that litigation to the
13 ACC.

14 So, on the same policies, to the extent we haven't
15 resolved everything and we still have fights about it, there is
16 already a pending coverage litigation involving a very
17 significant party to this litigation.

18 What Kaneb is seeking is precedence over that long
19 pending action so they can pursue their claims that they've
20 know about since 1995. They could have stepped in the coverage
21 action that was pending in New York. They did not.

22 So, for all those reasons, Your Honor, we just think
23 that -- it is our position, this is Grace's problem, Grace owes
24 us indemnity here.

25 Your Honor, I would like to hand up our -- we put out

1 our position for Grace, and I'd like to give Your Honor a copy
2 of that.

3 THE COURT: I'm sorry, what is it that you're handing
4 up?

5 MS. DeCRISTOFARO: It's our letter to Grace setting
6 forth our indemnification claim. We've already provided a copy
7 and served on Kaneb.

8 THE COURT: All right.

9 MS. DeCRISTOFARO: Dated March 25th.

10 THE COURT: Is this something you've filed?

11 MS. DeCRISTOFARO: No, Your Honor, it was something
12 that was after the papers were filed.

13 THE COURT: All right. You'll have to file it
14 though. I'll take it, but you'll have to electronically file
15 it if it's something you want on the public record.

16 MS. DeCRISTOFARO: Your Honor, because it involves
17 our settlement agreement, and all the matters relating to the
18 settlement agreement are deemed confidential, we've been
19 treating all these papers, including this as confidential. So,
20 when we file it, we'll file it under seal.

21 THE COURT: Okay. Then why are you giving me this,
22 I guess is the question?

23 MS. DeCRISTOFARO: Okay. I mean I can do it formally,
24 Your Honor. I just wanted to refer to it during the argument
25 that's all.

1 THE COURT: Okay. If you don't want it on the public
2 record, it's probably better that you not submit it at all. I
3 guess that's the issue.

4 MS. DeCRISTOFARO: Okay, all right.

5 THE COURT: I guess -- does Kaneb have any objection
6 to my reading this document?

7 MR. GILBERT: No objection, Your Honor.

8 THE COURT: Does the debtor have any objection to my
9 reading it?

10 MS. BAER: Your Honor, I have no objection at all.
11 I think the only point is that CNA has served us with a demand
12 letter with respect to the Kaneb request.

13 MS. DeCRISTOFARO: And it is supported by documents
14 going back to the 90s, as to why we have indemnification.

15 THE COURT: All right. I'm going to mark this as CNA
16 Exhibit 1 and I'll simply accept it since everybody has agreed
17 that I can read it as CNA Exhibit 1 for purposes of this
18 argument.

19 MR. LOCKWOOD: With respect to the confidentiality --

20 THE COURT: You need to use a microphone, Mr.
21 Lockwood, I'm sorry.

22 MS. DeCRISTOFARO: Sure.

23 MR. LOCKWOOD: With respect to the confidentiality,
24 and taking Ms. DeCristofaro's comment about assignments to the
25 PI trust, are we going to be permitted to take a look at this?

1 MS. DeCRISTOFARO: We sent it to you.

2 MR. LOCKWOOD: We will, okay.

3 MS. BAER: We forwarded it to you.

4 MS DeCRISTOFARO: Well, that gets us back to other
5 issues, but we won't address right now.

6 In any event, Your Honor, from our point of view,
7 there's been a number of misleading mistatements regarding the
8 extent of the coverage, regarding the application of the
9 settlement agreement, regarding the fact that this could be
10 somehow standalone litigation that would not -- I've been doing
11 this for a long time and I can tell you, there's no such thing
12 as a simple coverage litigation, that wouldn't impact. As I
13 said, we've litigated 16 years with Grace on the environmental
14 property damage claims and there is no way that there wouldn't
15 be overlap with coverage litigation on the same policies, on
16 the same -- on broader issues and it would be very difficult --
17 from our point of view, it would be impossible not to involve
18 the debtor. Given the long litigation about the rights to who
19 -- it turns out that Grace has no liability. That may also
20 mean that Kaneb has no rights under the policies. There's a
21 whole lot of things involved here.

22 And so, we do not agree that they have rights under
23 the policies, we think that as Ms. Baer said, it would be a
24 highly contested matter that would implicate all of the
25 litigation between Kaneb and Grace. We have a release from

1 Grace on the site that was signed off by Your Honor, we have
2 indemnity rights under the policies, there's no such thing as
3 separate coverage. All the claims would be subject to the
4 gradual pollution rights for which Grace released us, and gave
5 us indemnity.

6 So, for all those reasons, we think it would be
7 inappropriate to go forward with coverage litigation separately
8 with Kaneb at this time.

9 THE COURT: All right.

10 MR. BROWN: Your Honor, I'll be very brief. Michael
11 Brown on behalf of One Beacon and Seaton.

12 As Your Honor saw from our papers, we filed papers on
13 behalf of One Beacon, not Seaton. We are not taking any
14 position on the request for the lifting of the stay. We
15 certainly agree with Kaneb for One Beacon, that Grace has
16 brought indemnity rights to One Beacon with respect to Kaneb's
17 claims. We have served discovery on both Kaneb and the debtors
18 in an effort to understand more about these claims. We've
19 gotten some limited responses, but we're still very much
20 shooting in the dark as to what the claims are all about.

21 I note that Mr. Gilbert said that there was no
22 dispute that Kaneb has separate rights. I think that will be a
23 hotly disputed issue, as will a number of other coverage
24 issues, and I didn't want my silence to be construed as
25 agreement with those propositions. Indeed, I don't think want

1 my silence on any of these issues to be construed as agreeing
2 with the debtors or Kaneb or, frankly, even CNA on the coverage
3 issues that have been discussed here today. Thank you.

4 THE COURT: Okay.

5 MR. GILBERT: I'll be brief, Your Honor.

6 THE COURT: Mr. Gilbert.

7 MR. GILBERT: Bob Gilbert, I have no more than two
8 hours of -- I did want to address a couple of things.

9 Perhaps the most important is that you have to look
10 at what the source of these alleged indemnity obligations is,
11 because there have been a lot of broad assertions here of me
12 somehow being misleading, although they don't provide policy
13 excerpts that show that I am, or settlement agreement excerpts
14 that show that I've misled the Court in anyway. I haven't
15 misled the Court.

16 A parade of horrors, of a very indistinct variety
17 has been presented by Ms. Baer and by Ms. DeCristofaro, but
18 they don't bear out under scrutiny and we would propose to file
19 under seal the settlement agreements and provide within seven
20 days a very brief, not more than five page supplemental
21 memorandum pointing Your Honor to the exact provisions that
22 allegedly apply or don't apply, to demonstrate why the
23 indemnity obligations are hugely overblown.

24 I want to talk very quickly about the CNA,
25 Continental policies because that's the starting point. They

1 are the primary policies. There are two settlement agreements.
2 The first one provided an indemnity with respect to gradual
3 pollution limits. We have already stipulated that was never
4 our intent and it's not our intent. We are not seeking to have
5 the stay lifted with respect to the gradual pollution limit
6 coverage. If Ms. DeCristofaro believes that she has solid
7 coverage defenses, then she can knock out the case right away.
8 We don't think she'll be able to because strongly disagree, but
9 that's something for a different court. It's not something
10 that Your Honor has to decide. And it will not impact in any
11 way debtors because their indemnity goes solely to the gradual
12 pollution limits.

13 The second agreement, Your Honor, signed in 2004,
14 does not even contain an indemnity in it. Grace has no
15 responsibilities with respect to that. The second agreement
16 binds only Grace, it does not apply by its terms to any entity
17 for which Grace lacked legal authority to bind them. So, the
18 second agreement, the global environmental release, by its
19 terms, could not affect any rights that Kaneb has and by its
20 terms there is no indemnity that would bring debtors back in.
21 And Ms. DeCristofaro points to none of those. That's why we
22 think it's essential that we provide under seal those
23 settlement agreements and explain why it is inaccurate to
24 describe it in the way that they have.

25 With respect to the One Beacon policy, I don't really

1 have a whole lot else to add except for the fact that it
2 ultimately amounts to the tail wagging the dog. It is such a
3 tiny slice. There are a couple of broader points regarding
4 entanglement or alleged entanglement or alleged complication in
5 this case.

6 It's easy for they to say, oh, my gosh, Your Honor,
7 you will have a parade of lawyers in here arguing over this,
8 that or the other thing. Arguing over what? The debtors --
9 I'm sorry, the plan provides that the claims of the insurers
10 are treated as unsecured claims for which they will have full
11 rights after plan discharge. They have not come in here
12 seeking the right to lift the stay to pursue whatever indemnity
13 claims they assert that they have and they certainly have the
14 ability to pursue those once the plan has been approved.

15 If debtors believe that they need to be involved, the
16 only conceivable involvement that they would have and it's been
17 documented, put aside the parade of horrors, the indistinct
18 cloud of smoke out there, that they're pointing to, the only
19 thing that they've pointed to, that has any real bearing is the
20 One Beacon policy. That's a tiny sliver with minimal
21 entanglement and they haven't shown where the rubber meets the
22 road and where they actually would be supremely distracted in
23 any way, shape or form. We just think overall the balance of
24 equities strongly, strongly favors allowing Kaneb to pursue its
25 own insurance rights, not the rights that they could pursue on

1 behalf of debtor, we're not seeking that at this point and we
2 won't seek that, unless and until we win the appeal. But
3 pursuing the insurance rights that we have under the policies
4 is for another court to determine, if we're right or wrong, or
5 to what extent we're right with respect to our coverage rights,
6 but they do belong to us and we should be entitled to our day
7 in court so that we can address, especially with respect to
8 Otis Pipe Line this pressing issue that is bearing down on us
9 right now.

10 THE COURT: All right. Well, I will accept
11 supplemental papers. I don't know how they're going to impact
12 this, but there is an allegation that whatever they say is more
13 than whatever has been represented to me that they say. So, I
14 think I need to see them in the context and I think you need to
15 articulate for me where you think they say what they say and
16 then anybody else can articulate what they think they say and
17 then, perhaps, I'll have a more fulsome record on which I can
18 determine what I think they say.

19 So, how much time do you need to submit the
20 settlement agreements?

21 MR. GILBERT: I can submit the settlement agreements
22 right now, under seal. They're in an envelope with a notice of
23 filing under seal. And then, perhaps, we can file, each side
24 can file within seven days whatever views they have with
25 respect to how the settlement agreements impact these

1 proceedings.

2 MS. BAER: Your Honor, I completely object to that
3 process. I don't know what the heck he's going to say, I don't
4 know what he's going to get into but I guarantee you it's going
5 to be a complicated bunch of insurance issues that we're going
6 to have to get someone on, so it can't be simultaneous briefs.

7 If he wants to file in seven days that's fine, but
8 Your Honor, I'd ask for at least 21 days to respond.

9 THE COURT: Okay. When's the next omnibus?

10 MR. GILBERT: The 27th.

11 MS. BAER: It's April 27th.

12 THE COURT: Okay. This probably isn't going to get
13 onto that. What's the one after that?

14 MR. GILBERT: May 23.

15 THE COURT: May 23rd?

16 MR. GILBERT: Yes.

17 THE COURT: I may need some additional argument after
18 I see this. I just don't know. Why don't you folks get up
19 with a briefing schedule. I'm not sure, Ms. DeCristofaro, Mr.
20 Brown, are you going to need to submit something? You don't
21 know until you see what's been submitted by Kaneb?

22 MS. DeCRISTOFARO: I agree with Ma. Baer, I mean, I
23 don't know what -- they've already had an extra chance to reply
24 --

25 THE COURT: Use the microphone.

1 MS. DeCRISTOFARO: I'm sorry, Your Honor. They
2 already filed an additional reply after all of us filed our
3 papers.

4 THE COURT: Yes, they have.

5 MS. DeCRISTOFARO: And they've already have our
6 settlement agreements. It seems to me what they're asking for
7 is just another bite of the apple here.

8 I mean, I think there's a bottom line issue here,
9 which is, they're unilaterally deciding that their claims which
10 -- and the reason I felt compelled to hand up my letter was, it
11 made clear in black and white that they are subject to gradual
12 pollution limits. What they're saying is, we get to declare
13 they're not and, therefore, there's no indemnity. And then we
14 get back into what we would litigate and what we litigated for
15 Grace for multiple years. Are they gradual pollution or not?

16 THE COURT: Okay.

17 MS. DeCRISTOFARO: What's important is, that we have
18 a claim. So my only point on briefing is, one, I agree with
19 Ms. Baer, I think this is -- they don't need a second bite of
20 the apple because they had it.

21 THE COURT: Look. The issue is, you've stated that
22 they have misrepresented the content of the documents, I'm
23 giving counsel an opportunity to show that they either haven't
24 or have, misrepresented the content of the documents and then
25 everybody else an opportunity to respond. That's a serious

1 allegation. I want it clarified on the record. That's what
2 this is about. It's not a second bite at the apple, I'm not
3 accepting additional briefs in terms of the arguments that have
4 been stated, but I do want a clarity as to what the documents
5 actually show. That's the purpose of accepting supplemental
6 submissions.

7 MS. DeCRISTOFARO: So, it would be limited to that
8 purpose, Your Honor?

9 THE COURT: Yes, that's the purpose.

10 MS. DeCRISTOFARO: But I still think we would
11 probably -- I would agree with Ms. Baer on that.

12 THE COURT: All right. So, you want a week to file
13 the documents under seal.

14 MR. GILBERT: Your Honor, if we could have until next
15 Friday.

16 THE COURT: All right. Kaneb may file the settlement
17 agreements that it deems --

18 MR. GILBERT: Your Honor, we would propose to file
19 the settlement agreements at this time since they're large.

20 THE COURT: -- relevant. I'm not sure whether they
21 need to be filed electronically in order to keep them -- I
22 don't know the process here.

23 MS. BAER: No, they can't be.

24 THE COURT: They cannot, all right fine.

25 MS. BAER: I think because they're under seal, it's

1 just the hard copy envelope.

2 THE COURT: Okay. I'll take them, then. If they're
3 appropriately marked.

4 (Counsel speaking with one another)

5 MR. GILBERT: Okay, we will work with local counsel
6 to do it appropriately over the next couple of days.

7 THE COURT: All right. And then make sure -- I think
8 it would be helpful if you send two copies so that one is kept
9 here in the sealed file and another set can be transmitted to
10 me. Actually, Ms. Miller, if you don't mind, just send me a
11 set to Pittsburgh, marked under seal. All right?

12 MS. MILLER: I will. Yes, yes.

13 THE COURT: Okay. All right. So they're going to be
14 filed by -- are you talking about by April 3rd, or by April
15 10th?

16 MR. GILBERT: We would like to have until April 10th,
17 although I'm informed that that's a state holiday.

18 THE COURT: That's fine.

19 MR. GILBERT: So, we may have to go to the following
20 Monday, the 13th?

21 THE COURT: Okay. It's not a federal holiday, as far
22 as I know. Oh, but that's fine, courts may be closed anyway.
23 Sure, April 13th, is fine.

24 The settlement agreements, along with -- I'll call it
25 a memo, not to exceed five pages, so that you can point out

1 whatever it is that you feel you need to point out regarding
2 those agreements.

3 MR. GILBERT: Thank you.

4 THE COURT: All right. Now, and the debtor, CNA and
5 One Beacon, if you choose, may file additional documents, if
6 they're necessary, also under seal, and five page memos, also
7 explaining whatever it is that you're filing, by -- and you
8 want until when?

9 MS. BAER: Your Honor, could we have until May 8th?
10 I know I've got -- I'm going to be out of town all before then.

11 THE COURT: All right, by May 8th. Then, I'm sorry,
12 would you please just put this back on, on May 23rd, just in
13 the event that I need any additional argument. Frankly, I
14 don't think I will and I will attempt to have my staff cancel
15 that if necessary. I would suggest for those of you who are
16 out of town, you just make arrangements to call in. I really
17 don't think I will need anything more and I don't want you to
18 waste the time to come here, if I don't and I may not get to
19 this until a day or so before the hearing. So, I don't want
20 you to incur expenses that are necessary.

21 So, if you could, please put this high up on the list
22 of the agenda matters, contested agenda matters and then I'll
23 just tell you whether, at that time, whether I do or don't
24 think I need additional explanation.

25 MR. GILBERT: Okay.

1 THE COURT: All right, Mr. Brown.

2 MR. BROWN: Your Honor, that's all fine with One
3 Beacon and Seaton. I guess the one concern I have is, neither
4 One Beacon or Seaton has taken a position on the lift stay
5 motion and I'm not sure where this process is going to wind up,
6 but it sounds like there could be interpretation of settlement
7 agreements and/or policies and that puts us in sort of an
8 awkward position because I don't know ultimately where that's
9 going to lead and whether the Court is going to be making
10 rulings on the scope of the indemnity provisions or the scope
11 of the policies, or what coverage is at issue and it puts us in
12 a --

13 THE COURT: You're striking terror into my heart, Mr.
14 Brown.

15 MR. BROWN: Well -- and mine too, Your Honor. I mean
16 the concern here is that we've not taken a position on the
17 motion so I'd just as soon be silent. I'm not sure I'm going to
18 be able to be silent and I'm not sure that in the context of a
19 lift stay motion Your Honor isn't going to be making rulings
20 that may have repercussions, either with respect to plan
21 confirmation or for that matter, subsequent coverage
22 litigation.

23 THE COURT: And I don't know. I just don't know.
24 With respect to the relief from stay concerning the appeal, I
25 have not heard anything today that convinces me that that

1 appeal needs to go forward now. So, my inclination now is to
2 simply deny that motion, without prejudice, because I simply am
3 not convinced that there is any need for the appeal to be
4 pursued at this time. I think the prejudice to the debtor,
5 particularly inasmuch as litigation counsel for the debtor
6 would have to be involved in that and is also involved in
7 getting the plan process concluded, which I think at this point
8 is the most important thing that the debtor needs to undertake,
9 outweighs every other consideration and as a result, is simply
10 -- particularly because the debtor has already won that
11 litigation, both through a jury verdict and from what Ms. Baer
12 has said, and I take it this is not contested, through a motion
13 through reconsideration, in a motion to amend the verdict. Even
14 after those processes were concluded, the judgment was still
15 entered in favor of the debtor and against Kaneb at that stage.

16 I think the likelihood of success on appeal is
17 measured to a degree by those activities and Kaneb's likelihood
18 of success is not as high as may otherwise be anticipated and
19 as a result, that appeal can wait. So, my inclination is to
20 deny that motion without prejudice at this time and let's
21 focus, instead, on the insurance issues. So, I am prepared to
22 take an order that will deny that portion of this motion
23 without prejudice, but I think it can wait until the May 23rd
24 hearing. Perhaps I can do all of this at one time.

25 To the extent, the reason I'm doing this, Mr. Brown,

1 to the extent that One Beacon is concerned about that issue,
2 that's my ruling with respect to that issue. On the insurance
3 issues, though, I just don't know until I see the additional
4 documents.

5 MR. BROWN: Your Honor, it's actually the insurance
6 issues that are of a bigger concern and there are really two.
7 One is Kaneb seeking coverage as a judgment creditor which is
8 what you've just addressed and --

9 THE COURT: Yes.

10 MR. BROWN: -- and the other is seeking independent
11 rights under the policies. Could I just make a suggestion in
12 light of your concerns and my concerns, that we actually do go
13 forward with the hearing in May so that if it looks like we're
14 skating into areas that we shouldn't be skating into because
15 they're to be dealt with in subsequent coverage litigation, we
16 can at least bring that to Your Honor's attention?

17 THE COURT: All right, that's fine. Then we'll just
18 put it on the calendar, but still ask that it be put close to
19 the top of the list and parties still may appear by phone.
20 It's not going to be a long complicated argument. I'm not
21 redoing the arguments that I've heard today.

22 MR. BROWN: Okay. Thank you, Your Honor.

23 THE COURT: All right.

24 MS. BAER: Your Honor, one administrative issue. You
25 had indicated that the memo accompanying whatever documents,

1 should be five pages. I wanted to make sure that was for both
2 sides, Kaneb as well the debtor?

3 THE COURT: Yes, each side. Anybody who is filing a
4 memo is limited to five pages.

5 MS. BAER: Thank you, Your Honor.

6 THE COURT: And the agreement -- any documents that
7 you file should be filed under seal. But please, also send me
8 a courtesy copy to Pittsburgh since time may be short. I'd
9 like to receive them there, please.

10 I'm sorry, maybe I -- I think -- number seven
11 involved Otis and number eight involved Macon, is that correct?
12 It's not that one involved the appeal?

13 MR. GILBERT: That's correct.

14 MS. BAER: That's correct, Your Honor.

15 THE COURT: Okay. So, I have -- I still do need to
16 wait until May, I think, to adjudicate the motion in that
17 fashion. Okay.

18 MS. BAER: Yeah. In number seven, they asked for
19 both the appeal to go forward as well as the right to pursue
20 insurance coverage. So it's both of them in t hat motion and
21 in Macon, it's only insurance coverage.

22 THE COURT: Okay. As to Macon, I'm a little -- I'm
23 also a little troubled as to the need to pursue Macon at this
24 time. I don't, number one, I don't think the liability on
25 behalf of Kaneb is nearly as substantial as it is with respect

1 to Otis. I understand that the coverage issues may be somewhat
2 the same from what you folks are arguing and so, perhaps, the
3 Court needs to adjudicate the issues at one time, in any event.
4 But to the extent that the contractual indemnity provision is
5 there, the circuit has been pretty clear about the fact that
6 when you've got a contractual indemnity that's a pretty good
7 reason not to lift the automatic stay. In fact, you can use
8 that as a basis to extend the automatic stay to certain other
9 entities in certain circumstances.

10 So, I think you've got an uphill battle with respect
11 to Macon that may not, or may exist with respect with Otis, but
12 is not the same as the battle with respect to Otis. So, my
13 inclination as to Macon is, I'm not sure I understand as fully
14 in that context, where there is as much of a necessity,
15 particularly since mediation is not scheduled there. I'm not
16 seeing the urgency in Kaneb's argument with respect to Macon
17 that I'm seeing with respect to Otis.

18 So, just as a precursor for May, my inclination at
19 the moment as to Macon is to say that I'm not seeing the need
20 for relief from stay on that project right now, either. If you
21 folks have any desire to talk to each other, perhaps, that will
22 serve as the basis for your talking between now and the May
23 hearing. Okay.

24 MR. GILBERT: Thank you, Your Honor.

25 MS. BAER: Thank you, Your Honor. Your Honor, that

1 concludes the agenda unless there's anything else someone needs
2 to take up.

3 THE COURT: Anyone have any housekeeping matters to
4 address?

5 (No audible response)

6 THE COURT: Okay, we're adjourned. Thank you.

7 MS. BAER: Thank you.

8 * * * * *

9 C E R T I F I C A T I O N

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11 I, ELAINE HOWELL, court approved transcriber, certify that
12 the foregoing is a correct transcript from the official
13 electronic sound recording of the proceedings in the
14 above-entitled matter and to the best of my ability.

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